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Summaries of
Decisions
Volume 18
(1989)

Commercial Registration Appeal Tribunal



Ontario

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Summaries of Decisions

Volume 18 (1989)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS* - VOLUME 18

CITED 1989 18 C.R.A.T.



- * This volume contains in some instances full decisions and reasons given, and in others, summaries only. If reference to the exact decision is desired, application should be made to the Registrar.

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Dani, Quemal Cam	Compliance with agreement	12 C.R.A.T.	240
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Doherty, Patrick A.	Adjournment granted	18 C.R.A.T.	425
Gentile, Angelo	Stay on Consent	11 C.R.A.T.	154
Hasfal, Orville A.	No jurisdiction	18 C.R.A.T.	437
Horhager, Andreas	Different panels	11 C.R.A.T.	193
Kornitzer, Dan E.	Request for Stay	17 C.R.A.T.	279
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Appleby Travel Service	Suspension lifted	18 C.R.A.T. 416
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Aslanidis, Steve (See Thessaloniki)		
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Danni International Travel Agency Ltd	Adjournment and Order	12 C.R.A.T. 246
Douglas Travel (See Starburst Holidays)	Consent Order	12 C.R.A.T. 247
Hadjiyannakis, Andy (See Bolos Travel)		
Koehler, Susan (See Lifestyle Travel)		
Lawson McKay Tours	Refusal of affidavit evidence	11 C.R.A.T. 206
- Clark et al	No jurisdiction	11 C.R.A.T. 209
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Lifestyle Travel (Susan Koehler)	Adjournment and Order	12 C.R.A.T. 252
Lowes, Florence	Entitlement to hearing	15 C.R.A.T. 267
Manila International Travel Agency Ltd	Suspension	13 C.R.A.T. 303
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- Golden Gate Nurses Association Inc.	Multiple claims	
- Chappel et al	- Adjournment	11 C.R.A.T. 246
Professional Seminar Consultants		
- Associated Building Industry of Northern California		
- Brown et al	Affidavit evidence	14 C.R.A.T. 199
- Medical Society of Santa Barbara County		
- Almklov et al	Affidavit evidence	14 C.R.A.T. 199
- Alameda County Dental Society		
- Crutcher et al		14 C.R.A.T. 199
Starburst Holidays Inc.		
(Douglas Travel)		
(Traveler's Tree)	Consent Order	13 C.R.A.T. 361
Stippinger, Angela		
(see AGS International Travel)		
Thessaloniki-SKG Travel Service	Adjournment and Order	
(Steve Aslanidis)		16 C.R.A.T. 284
Traveler's Tree (See Starburst)		
Unitravel Services		
(see 141603 Canada Limited)		18 C.R.A.T. 453

C. AURORA PAVING LTD.

APPEAL FROM A DECISION OF THE
REGISTRAR OF THE CONSUMER PROTECTION BUREAU
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MacFARLANE, Member

APPEARANCES:
GIUSEPPE MANCUSO, representing the Applicant
GAIL MIDANIK, representing the
Registrar of the Consumer Protection Bureau

DATE OF
HEARING: 17, 18, 19 October 1988 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by C. Aurora Paving Ltd. from the decision of the Registrar to refuse registration of that company as an itinerant seller under the Consumer Protection Act, R.S.O. 1980, Chapter 87.

In his decision, the Registrar has invoked Section 6 of the Act which provides that the Registrar may refuse to register an applicant where in the Registrar's opinion the Applicant is disentitled to registration under Section 5 of the Act.

The Registrar's Proposal sets out his reasons for refusal as follows:

- (1) C. Aurora is a corporation and the past conduct of its officers and directors, namely Carmelo Mancuso, President...and Leopaldo Giuliano, Secretary...and Giuseppe Galuzzo...affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

C. Aurora Paving Ltd. is a corporation duly incorporated under the laws of Ontario on March 17th, 1983, having its head office at 1086 St. Clair Avenue West, Toronto, Ontario. Its directors are as follows:

President/Director

Carmelo Mancuso - 28 Leggett Ave., Weston, Ontario

Secretary/Director

Leopaldo Giuliano - 33 Kennedy Rd.S., Brampton, Ontario

Treasurer/Director

Giuseppe Mancuso - 386 Hillmount Ave., Toronto, Ontario

Vice-President

Giuseppe Galluzzo - 100 Fawcett Trail
Scarborough, Ontario

On the company's application, the four directors indicated that they had been in the paving business for some years from 1976 to the present. They apparently had worked for Carmelo Mancuso who operated a paving business as a sole proprietor from February 26th, 1980 until August 8th, 1987 when his registration was revoked because of his failure to provide a bond as provided by Section 8 of Regulation 181 of the Act. It appears that Mancuso had decided to allow his registration for the sole proprietorship to lapse and apply for a licence under the corporate name which he did on July 15th, 1987. We do not find that surprising in view of the number of complaints against Mancuso's operation.

The Registrar has received 67 complaints about Mancuso's work since the sole proprietorship was in business or at least from December 1982 to July 1987. At the present time, there are twelve complaints outstanding with four of those now resolved. There are a further twelve which are sub judice, the subject of litigation in the Small Claims Court. There were a further nine pending, of which five appear now to be resolved. We note there are two more complaints lodged against the limited company which has obviously been operating without a licence contrary to Section 4 of the Act.

As a result of the number of complaints being continually received by his department, the Registrar directed a letter to Mancuso on September 18th, 1985, listing ten outstanding complaints and requesting a reply before September 25th, 1985. There was, however, no response. A further letter was sent on October 22nd, 1985, requesting Mancuso to attend at

the Registrar's office on October 31st. A meeting was held on that date to discuss the outstanding complaints, five of which were subsequently resolved, but by November 7th, three new complaints were filed. Further correspondence was sent to Mancuso to which he did not respond including a list of terms and conditions required to permit him to continue to operate. Mancuso either did not agree to the conditions demanded by the Registrar or simply ignored them. In any event, he did not sign them as requested, but simply continued to operate his paving business. Complaints continued and customers could not even reach Mr. Mancuso by telephone although he alleges he has an office in Toronto which is handled by a secretary. This office, ostensibly his, appears to be occupied by a travel agency.

The history of Mancuso's paving business, fraught with complaints and unfinished litigation can lead us to no other conclusion but that he should be refused registration or operate forthwith within the Regulations and disciplines set out by the Registrar and the Act. This Tribunal is most reluctant to refuse registration and possibly deprive a man of a living in the only kind of work he possibly knows, but if he is to continue to operate on the edge of or outside the law, we must weigh that against the protection of the public which is the purpose of the Act.

We have dealt with Mancuso, but what of the other three partners in this company? The application for registration includes a question:

Have you ever been convicted or found guilty of an offence under any law of any country, or state, or province thereof or are any such offence proceeding pending?
If "yes" give full particulars in a separate statement, signed, dated and attached to this application, the answer to this question was "no".

We note, however, in the Notice of Proposal the following:

10. ...Leopoldo Giuliano, Director and Secretary of C. Aurora, was convicted on April 3rd, 1978 under the Criminal Code of theft over \$200.00, theft under \$200.00, possession of stolen property under \$200.00 and given a conditional

discharge with one year probation. A further conviction was registered on February 7, 1979 for failing to appear which resulted in a \$300.00 fine or in default 30 days in jail. A subsequent conviction was recorded on November 6, 1979 of break and entry with intent with a sentence of 30 days to be served intermittently and probation for two years. Lastly there was a conviction on August 14, 1980 of obstruct peace officer, with a fine of \$100.00 or in default ten days in jail.

11. Investigation by the Registrar has also revealed a number of driving related offences and convictions against Leopoldo Giuliano:

<u>Date</u>	<u>Conviction</u>
Feb. 20/79	Driving while disqualified
Mar. 14/79	Speeding
Jan. 30/80	Driving wrong way on a one way street
Oct. 22/80	Speeding
Oct. 22/80	Driving without a licence
Sept. 30/81	Refusing examination of an unsafe vehicle
June 3/82	Speeding
Sept. 2/83	Speeding
Sept. 29/83	Speeding
Sept. 10/84	Speeding
Oct. 16/84	Prohibited turn
Oct. 24/84	Impaired driving
Mar. 24/86	Speeding
Aug. 12/86	Passing vehicle on the right
July 6/87	Speeding

12. The driving record for Leopoldo Giuliano also indicates a suspension of licence on or about January 12, 1978, and further suspensions on October 22, 1978, February 20, 1979, April 9, 1979, September 29, 1980, October 19, 1982 and October 24, 1984. None of the above suspensions and convictions were outlined in response to question no. 7 on the application form.

13. A further investigation by the Registrar has revealed a number of driving related offences and convictions against Giuseppe Mancuso, the Director and Treasurer of C. Aurora:

<u>Date</u>	<u>Conviction</u>
July 18/79	Speeding
Nov. 15/79	Failing/Improper use of seatbelt
Feb. 29/80	Speeding
May 4/82	Failing/Improper use of seatbelt while driving
Oct. 12/82	Speeding
Dec. 2/82	Speeding
Aug. 30/83	Speeding
July 27/84	Careless driving

None of these convictions were disclosed in response to question no. 7 on the application form.

14. Investigation by the Registrar also reveals a number of driving related offences and convictions against Giuseppe Galuzzo, the Vice President of C. Aurora:

<u>Date</u>	<u>Conviction</u>
Mar. 11/81	Careless Driving
Oct. 28/85	Speeding
May 26/86	Failing to have an insurance card
Nov. 4/86	Speeding

The driving record also indicates a suspension on October 10, 1982 and that at present Giuseppe Galuzzo is unlicensed, the expiry date having been September 20, 1987.

These convictions can indicate nothing less than a complete disregard for the law; what then is the solution? Do we licence them to continue preying on an unsuspecting public after seeing the shabby record of Carmelo Mancuso, the President of this company and the flagrant violations of the

law by his associates. It may be alleged that the complaints against Mancuso are the only relevant factors to be considered. The Registrar thinks not. He points to the record of three of the Applicants, their failure to disclose that record and the lamentable history of Mancuso's paving business. The Act contemplates integrity and honesty in business and it is not the honesty, so much as the integrity of the partners, that is now questioned.

Against this background, we must weigh the evidence of Mr. Mancuso. We considered him honest and straightforward in his testimony admitting that problems did arise from his work, but that due to the number of driveways he paved during the season (200 per week), it was often difficult to get his equipment back to the complainant. Cost, however, appeared to be the crux of the matter. He pointed out quite candidly that each customer received only that which he ordered. The majority of his contracts were for the cheapest driveways and as a result, they simply could not be expected to last. He said a driveway costing \$600.00 might be average, but the work could not be compared to a driveway costing \$1,200.00.

It is clear, therefore, to the Tribunal that the majority of complaints arise from the customer expecting a \$600.00 paving job to last as long as one which would cost double that amount. We, therefore, cannot find dishonesty in Mancuso's work, perhaps shoddiness and carelessness, but not dishonesty.

The Tribunal is of the view that registration be granted to the appellant company, but only upon its commitment to agree to terms. Accordingly the Tribunal by virtue of the authority vested in it under Section 7(4) of the Consumer Protection Act, directs the Registrar to grant the registration subject to the following terms and conditions:

1. All contracts entered into with consumers shall indicate a specific date when the work will be completed and this date shall be within one month from the date of the contract.
2. If for any bona fide reason, the work cannot be completed within the time period allowed, an alternative completion date may be negotiated with the consumer. However, acceptance of a change of date must be in writing and signed as accepted by the consumer.

3. If a consumer requests cancellation of a contract due to non-performance by C. Aurora Paving Ltd., the deposit money shall be returned to the consumer within 30 days.
4. A designated officer of the company shall reply in writing to all correspondence received from the Registrar or the Consumer Services Bureau within 10 days of the date of the letter and to act upon any request so made.
5. All requests from consumers to have repair work carried out under the terms of the warranty provided by C. Aurora Paving Ltd. in their contracts shall be honored and completed in a satisfactory manner within 60 days' of receiving the request.
6. All telephone calls and letters directed to the business premises shall be responded to within 5 days.

In the event that the Applicant fails to meet the above requirements, the Registrar is hereby directed to carry out his Proposal forthwith.

MARIO J. MENEZES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF THE CONSUMER PROTECTION ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
B. GRANT, Member

APPEARANCES:

MURRAY H. SHORE, representing the Applicant

JANE WEARY, representing the Registrar of the
Consumer Protection Act

DATE OF

HEARING: 30 May 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Mario J. Menezes from the decision of the Registrar to refuse him registration as an itinerant seller under the Consumer Protection Act, R.S.O. 1980, Chapter 87.

The Proposal of the Registrar was issued on July 21st, 1988, and a hearing before this Tribunal was requested by Mr. Menezes by letter dated July 25th, 1988. A hearing was scheduled for January 4th, 1989, which was adjourned sine die at the request of Mr. Menezes, to be brought back on 10 days' notice by any party. Upon further notice, the matter was brought to the Tribunal on May 30th, 1989.

The Consumer Protection Act requires the registration of any itinerant seller who is defined by Section 1(k) as meaning:

a seller whose business includes soliciting, negotiating or arranging for the signing by a buyer, at a place other than the seller's permanent place of business, of an executory contract for the sale of goods or services, whether personally or by his agent or employee;

An executory contract is also defined by Section 1(i) as:

a contract between a buyer and a seller for the purchase and sale of goods or services in respect of which delivery of the goods or performance of the services or payment in full of the consideration is not made at the time the contract is entered into;

Mr. Menezes proposed to carry on a waterproofing business for house and other building foundations, both for those under construction and for occupied structures. The Registrar refused to allow Mr. Menezes to become registered pursuant to Section 5(b) of the Act on the grounds that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

While Mr. Menezes did acknowledge in an answer on an application to having been found guilty of an offence, he did not indicate the nature of the conviction.

The criminal record of Mr. Menezes is as follows:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
10/24/73 Toronto	Theft	9 mos. def and 3 mos indef
04/26/74		Paroled
03/03/81 Toronto	(1) Poss of Stolen Property Over \$200	(1) Susp sent and probation for 1 yr
	(2) BE & Theft	(2) 6 mos.
05/04/81		Paroled
08/31/81	Parole Violator	Recommitted
01/04/82 Toronto	Uttering	Fined \$700 i/d 2 mos.
02/05/86	Poss. of a Narcotic	Fined \$75 i/d 5 days

Mr. Bill Stoddart, the Registrar under the Consumer Protection Act, gave evidence that Mr. Menezes had not been previously registered; and that he had not previously been in this proposed business. Since full particulars of the criminal record

had not been provided, a police report was obtained. A letter outlining the criminal record was sent to Mr. Menezes with the announcement of rejection and a reminder that it was unlawful to carry on as an itinerant seller without registration, and that the penalties for so doing are severe.

At a meeting with Mr. Menezes on June 28th, 1988 to review the situation, Mr. Stoddart found him difficult to understand with a selective memory and with someone else to be blamed for the various events. There appeared to be little sense of guilt or remorse.

Mr. Menezes is on a full Worker's Compensation Board disability pension, and looked to the estimating and managing of the proposed business as a source of necessary income for his wife and her children.

On the application form, in answer to the question concerning any convictions, Mr. Menezes did answer "Yes", but provided no details. A search of his record showed a three page driver's history over ten years of driving while disqualified, of licence suspension and reinstatement on six occasions, of speeding and of disobeying traffic rules.

Mr. Stoddart concluded that this case was one of the several each year of more than 200 applications where registration should not be granted because of failure to fully disclose his past record; the type of offences involved and the attitude shown at the meeting with Mr. Menezes; and the slim work history in this area which the Applicant has.

Mr. Mario Menezes is 33 and very well spoken. He acknowledged his criminal and driving records and told the Tribunal that he plans to conduct a business on his own from his residence while hiring the necessary persons to do the actual physical work. Because of his present back problems, he will be the owner/manager and do the estimates and marketing. He has filed a \$5,000 bond with the Ministry and has a local waterproofing licence. He is carrying on a business now with a 30 day billing cycle, and has done several minor jobs.

Mrs. Janet Menezes is a former drug addiction counsellor, who is now in other business and she spoke of her husband's honesty and integrity over the past three years that they have been together. She spoke of her own father's and children's acceptance of Mr. Menezes and of his desire to improve himself and conduct his own business.

Counsel for the Registrar in summary cited Mr. Menezes' past conduct from age 15 to age 31 as showing a lack of

responsibility, and a pattern of activities which would not benefit the customers who Mr. Menezes would approach. His lack of experience in this business, the incompleteness, incorrect application form, the impression made at the interview, and the acknowledgment that he is carrying on business now while unregistered and in the face of a warning in the letter sent to him, all show that consumer protection requires that he need not be registered.

Concerning the previous standards of the Tribunal, counsel cited two decisions. In the case of Peter Kodis (1985) 14 CRAT Summaries of Decision, p.187, a real estate salesman with thirteen years' experience did not on a renewal fully disclose current criminal matters, and the Proposal not to renew his registration was upheld by the Tribunal. The Tribunal said:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberations in respect of the omissions and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance.

.....

In the case of Orval David Bradd (1987) 16 CRAT Summaries of Decisions, p.202, registration as a real estate salesman was refused again due to the failure to disclose full particulars of criminal, bankruptcy and driving records.

The Tribunal noted at page 204:

The standard of "reasonable grounds to believe" is not to be equated with proof beyond a reasonable doubt. The standard to be met is one of reasonable probability. In assessing the probable future action of an individual, some reliance may properly be placed on the past acts of that individual

The Tribunal concluded that the Registrar had not erred in his belief that Mr. Bradt should not be registered at that time.

In reply, counsel for Mr. Menezes stated that no wilful hiding of past history took place and that others were readily able to get the full record. He cited to the Tribunal the recent decision of C. Aurora Paving Limited heard on October 17th-19th, 1988, and released March 15th, 1989.

In the case, thirteen years of operation as a driveway paving company had led to some 67 complaints over a recent five year term. In addition, one of the four partners had both a criminal and driving record which had not been fully disclosed, while two others had driving records which were not disclosed. In spite of this history, the Registrar's decision to refuse registration was overruled, and certain terms and conditions were imposed upon registration.

In considering the facts brought before the Tribunal, we cannot say that the Registrar has erred in his belief that Mr. Menezes should not now be registered. Accordingly, by virtue of the authority vested in it under Section 7(4) of the Consumer Protection Act, the Tribunal directs the Registrar to carry out his Proposal.

CAREY'S RESTAURANT (DUNDAS) INC.
(CAREY'S RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE FOR A PERIOD OF TEN DAYS

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Member
DENNIS J. EGAN, Member

COUNSEL: KERRY BLOYE, its agent

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF
HEARING: 2 November 1989 Toronto

REASONS FOR DECISION AND ORDER

At the outset of the hearing, the Applicant through its agent Mr. Kerry Bloye, who acknowledged being the President of the Applicant and a 27% shareholder, admitted the complaints set out in the Notices of Proposal dated October 11, 1988 and February 24, 1989 with respect to overcrowding, but not the complaint with respect to the serving of liquor to persons in an intoxicated condition. The Tribunal noted that this had been the position of the Applicant before the Liquor Licence Board on May 30, 1989 as well.

The Tribunal noted that the Liquor Licence Board had before it a number of witnesses brought by the Applicant and that the Board also gave considerable benefit to the Applicant's "positive steps...to identify and rectify the situation and prevent the occurrence of these events" and as a result the Board reduced the suspension of licence from 14 days to 10 days.

In his submission to the Tribunal, Mr. Bloye contended that he should have a suspension of his licence but suggested it should be less than the 10 days imposed by the Board.

Tribunal, therefore, has not had the benefit of the evidence which the Board had before it and which resulted in the decision to which reference has been made.

The complaints of overcrowding occurred over a considerable period of time and in fact an incident was noted as recently as the second week-end of August, 1989, subsequent to the Board Hearing in May.

The facts relating to overcrowding admitted by the Applicant are as follows:

A conviction for overcrowding was issued September 14, 1987. Overcrowding, however was again noted January 31, 1988, February 6, 1988 and July 1, 1988. A Notice of Proposal was issued on October 11, 1988, but a further overcrowding was noted on October 22, 1988. At the hearing before this Tribunal, a further incident of overcrowding was noted in August of this year. Whatever procedures Mr. Bloye has instituted, whatever rectification Mr. Bloye has attempted, appears to this Tribunal to have been ineffective in preventing the overcrowding which resulted in the decision of the Board to impose a 10 day suspension of licence.

Under the circumstances, therefore, the Tribunal is satisfied that the Board correctly assumed its responsibilities in imposing the suspension in order to impress upon the Applicant and others that overcrowding is not to be condoned. The Tribunal is not prepared to alter the period of suspension, which the Board after what appears to have been a careful and fair hearing imposed, given the submissions even of the Applicant that at least a three day suspension was warranted.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act the Tribunal confirms the decision of the Liquor Licence Board of Ontario on the 30th day of June 1989 and directs the said Board to set the date of commencement of the suspension.

JEAN AND JACK CUNNINGHAM
HELGE AND LINDA HUURE

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO VARY THE HOURS OF BEVERAGE ALCOHOL
TO CEASE AT 11:30 P.M.

RE: BORDEAUX RESTAURANT LIMITED

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
MICHAEL E. LERANBAUM, Member
DENNIS EGAN, Member

APPEARANCES:

JEAN AND JACK CUNNINGHAM
HELGE AND LINDA HUURE - Applicants

MORRIS MANNING, Q.C., representing the Licensee

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF
HEARING: 12 October 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an application by Jean Cunningham, Jack Cunningham, Helge Huure and Linda Huure to be added as parties to the proceedings herein and, if so, to be granted an extension of time for the filing of an appeal from the decision of the Liquor Licence Board which followed a hearing on February 21st, 1989; which decision was released on April 21st, 1989. In addition, the City of Scarborough also seeks to be added as a party and, if successful, to have the time of appeal similarly extended.

Bordeaux Restaurant first came before this Tribunal on June 27th, 1979 on an appeal from the imposition of an 8:00 p.m. closing term on its liquor licence. The condition was upheld - 1979 3 L.L.A.T. 36. On the second appearance on May 7th, 1980, a proposal for a 30 day suspension of the liquor licence was reduced to 21 days by the Liquor Licence Board at a hearing. This ruling was upheld by this Tribunal - 1980 4 L.L.A.T. 15.

On March 5th, 1985, Bordeaux Restaurant did appeal a decision of the Liquor Licence Board not to remove the 8:00 p.m. closing term and on the hearing before this Tribunal, Jean Cunningham, Linda Huure and the City of Scarborough were present as parties. That decision followed applications by Bordeaux Restaurant in April 1981 and in January 1983 to remove the term which were both unsuccessful and at which again, these three were parties. The Tribunal refused to remove the term - 1985 14 C.R.A.T. 37.

The next hearing before this Tribunal took place over four days from September 24th, 1986 to April 16th, 1987. Again Jean Cunningham, Linda Huure and the City of Scarborough were parties. The Liquor Licence Board had proposed to refuse to renew the liquor licence, but the Tribunal ordered renewal with the continuing term of an 8:00 p.m. closing -1988 17 C.R.A.T. 1.

In October 1988, Bordeaux Restaurant sought again to extend the hours of service. The proposal of the Liquor Licence Board was again to reject this application and a hearing was requested which took place on February 21, 1989. Having sought to cancel the licence of Bordeaux Restaurant on January 28th, 1986, which decision led to the hearing reported at 1988 17 C.R.A.T. 1, and which further decision is under appeal by the City of Scarborough to the Divisional Court of the Supreme Court of Ontario, the Liquor Licence Board extended the hours of service for Bordeaux by three and one-half hours to 11:30 p.m. nightly.

At the hearing of February 21st, 1989, the following was recorded in the decision of the Liquor Licence Board:

At the commencement of the hearing, a motion requesting an adjournment was entered by Board counsel, citing the fact that no representatives of the City of Scarborough were present, also that none of the objectors who were on hand at the last hearing on the matter before the Board were present. In addition, a Board staff member slated to testify was absent.

Mr. Morris Manning, Solicitor for the Licensee, opposed the motion.

Upon determination that notice had been provided to the City and to the former objectors, and that the Board witness was not ill but was engaged with other duties, the motion was denied and the hearing proceeded.

In the evidence before this Tribunal, both Jean Cunningham and Linda Huure stated that no notice of the hearing or invitation to be present at the hearing was received by either of them. Counsel for the Liquor Licence Board allowed that the practice of the Liquor Licence board was to routinely notify any interested persons whose names appeared in the Record of the Board, and he could not give any proof that any such notice was sent to Jean Cunningham or Linda Huure even though both of these ladies were involved in this ongoing situation for some ten years.

While some notice went to the City of Scarborough at least by a telephone call from counsel for the Liquor Licence Board, the City was not represented at the hearing. At the least, the City of Scarborough could have sent an agent to request an adjournment of the hearing, but this was not done. Now the City council has passed a resolution and seeks to be formally added as a party to these proceedings. The City was a party to earlier hearings and had caused the Notice of Appeal of the decision reported in 1988 17 C.R.A.T. 1, to be served on the Liquor Licence Board on April 27th, 1988, so the Board was well aware of the continuing interest of the City of Scarborough in these premises.

A letter was sent by Jean Cunningham, Linda Huure, and other residents of the Bimbrok area to the Liquor Licence Board on April 1st, 1988, and attached to it was a further letter of a particular complaint from Shirley Valentini. We do not know whether or not those or other concerns would have had an influence on the eventual decision of the Liquor Licence Board, but the failure to invite known, well-established, concerned persons by the Liquor Licence Board to participate in the hearing which is but another step along this road is not explained, and is a serious, procedural error which must be corrected.

The Tribunal does not see the need for Mr. Jack Cunningham or Mr. Helge Huure to be added as parties since the information they may have and the interest they show in this matter is generally just a duplicate of that of Jean Cunningham and Linda Huure.

Counsel for the Liquor Licence Board could not explain to the Tribunal why the material concerning notice as quoted from the decision of the Liquor Licence Board read as it did.

Section 12(2) and (3) of the Liquor Licence Act reads:

- (2) The Board shall fix a time and place for the hearing of the application and shall at least ten days before the day fixed cause notice thereof to be served upon the applicant, and upon any other person appearing to the Board to have an interest in the application.
- (3) Every person upon whom notice of a hearing is served and any other person added by the Board is a party to the proceedings.

It is the decision of this Tribunal that the failure of the Liquor Licence Board to notify Jean Cunningham, Linda Huure and the City of Scarborough with respect to the hearings of February 21st, 1989 is a clear breach of Section 12(2) of the Liquor Licence Act.

In addition, Section 10(7) of the Ministry of Consumer and Commercial Relations Act states:

- (7) Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are prima facie grounds for granting relief and that there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension.

This Tribunal is satisfied that there are prima facie grounds for granting relief and that there are reasonable grounds for applying for the extension.

Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby:

1. revokes the decision of the Liquor Licence Board of Ontario dated the 21st day of April, 1989;
2. requires that Jean Cunningham, Linda Huure and the City of Scarborough be added as parties to this matter;
3. extends the time for the filing of an appeal herein to November 30th, 1989;
4. requires the Liquor Licence Board to hold a new hearing in this matter.

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by Bordeaux Restaurant Limited. The appeal had not been concluded at the time of this publication.

577029 ONTARIO CORPORATION and
577030 ONTARIO INCORPORATED
(STUDIO ONE HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

GEORGE A. MARRON, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 28 Nov. 1988, 6 April Niagara Falls & Toronto
27, 28 June 1989

REASONS FOR DECISION AND ORDER

This is an appeal by 577029 Ontario Corporation and 577030 Ontario Incorporated carrying on business as Studio One Hotel from a decision of the Liquor Licence Board issued on September 1st, 1988 to revoke liquor licences for the premises as of September 26th, 1988. The property at 5951 Main Street is the former Prospect Hotel in Niagara Falls, Ontario and was purchased in 1984 by a limited company owned equally by Eduardo Varela and his wife, Antonia Varela.

The two liquor licences for the hotel were issued to the two Ontario companies as No.010742 in equal partnership with the "29" owned by Eduardo and Antonia Varela in equal shares and the "30" owned solely, as officer, director and shareholder, by their son, Humberto. Of the "29" company, Eduardo is president and Antonia is secretary, and they are the sole officers, directors and shareholders. The Lounge Licence has a capacity of 404 on the main floor and is a very popular location with female strippers as entertainers. The Dining Lounge licence covers a divided dining room with two rooms of 62 and 41 seats, and a divided basement area where male strippers are featured in room capacity of 173 and 62.

On March 14th, 1988, the Liquor Licence Board proposed to revoke these licences because the past conduct of these three

persons as officers, directors and shareholders of the licence-holders affords reasonable grounds for belief that the business will not be carried on in accordance with law, with integrity and honesty.

The four particulars in the proposal were as follows:

1. A five-day closing of the basement dining lounge area from January 27 to 31st, 1986 had been imposed because more games were allowed than permitted and because the draft beer was not identified for consumers.
2. Persons under or apparently under the age of 19 were allowed on the premises and identification had not been obtained for these persons. On September 2nd, 1987, five young Americans aged between almost 17 and just less than 19 were arrested and eventually convicted and fined for being on the premises. The Notice referred only to four of them and misspelled the names of two. There was no evidence that any of them had in fact been served any alcoholic beverage.
3. As a result of the facts in item 2, a failure to have the premises under the management and supervision of an experienced person was also cited; in breach of subsection 8(15) of the Regulations.
4. The execution of a Narcotics Search Warrant on December 16th, 1987 led to the seizure of unlawful drugs and to the charging of the three Varelas and others, both employees and not, with various drug offenses.

On May 2nd, 1988, further particulars were added by Notice as follows:

5. Additional information to bolster the breach of subsection 8(15).

6. The execution of a further narcotics search warrant on February 2nd, 1987 led to further seizure of unlawful drugs and to further charges of various drug offenses being laid against the three Varelas and others, both employees and not.

A request for a hearing before the Liquor Licence Board was made on March 23rd, 1988, and after an earlier date was set and after an adjournment, a hearing did take place on July 19th. The Liquor Licence Board heard evidence from four police officers as to the events in the 2nd, 3rd, 4th, 5th and 6th particulars as above.

The second particular of under-age patrons was said to be the first event on some 30 visits and no evidence of any alcoholic beverage service was found. This was not in itself enough to revoke a licence.

The third and fifth particulars were based on a seven-page report by a Liquor Licence Board inspector who discovered various regulatory offenses particularly concerning the food/liquor ratio in the Dining Room Licence and the disarray over 4 years of the books and records of the operation. The Board again found that correction could occur and that this should not form the basis for the revocation of the licences.

The fourth and sixth particulars dealt with the two narcotics raids wherein cocaine was seized on December 16th, 1987 and on February 2nd, 1988.

Following undercover RCMP involvement from April 13th, 1987 and the purchase of cocaine on the premises using marked currency, a raid on February 2nd, 1988 led to charges being laid against Humberto Varela and two employees. Guilty pleas to conspiracy to traffic were accepted, and Humberto was sentenced to 15 months in jail and a \$40,000 fine. The employees received sentences of one year and six months. Another person, Michael Stewart, was convicted of trafficking in cocaine and received the sentence of eight months as this was a second offence.

An independent raid by the Niagara Regional Police occurred on December 16th, 1987 during the undercover operation. The facts were summarized in the Liquor Licence Board decision as follows:

Constable Mark Lightfoot testified that on December 16, 1987 police officers were conducting a search under a search warrant in the beer cooler, a room located behind the bar. Eduardo Varela asked the officers if he could open the bar downstairs and take beer from the cooler. Mr. Varela, with the aid of a bouncer, removed two cases of beer from the cooler without incident. He returned with another bouncer, stated that he needed Brador and pointed out two particular cases to the bouncer. One of the cases was not properly sealed. Constable Lightfoot became suspicious and examined the case. Inside one case of Brador he found fifty individually wrapped "decks" of cocaine. Eduardo Varela, his wife Antonia Varela, and the manager Paul Cicchini, were charged with possession of a narcotic. Charges were subsequently withdrawn by the crown.

At the time of the Liquor Licence Board hearing, Antonia Varela was actively managing the premises and Humberto Varela was in jail. The Liquor Licence Board did FIND that

Mr. Varela knew of the presence of the cocaine in the licensed premises and that he attempted to remove it from the reach of the police officers executing the warrant. This knowledge and this conduct (whether or not it constitutes a criminal offence) affords reasonable grounds for belief that Eduardo Varela will not carry on business in accordance with law and with integrity and honesty.

and further that

As licence holders, Mr. & Mrs. Varela, at the very least had a responsibility to inquire into and take measures to stop the activities for which their son and employees were convicted. They failed to do so. Even though Mrs. Varela was specifically questioned about her efforts in this regard, she could point to no concrete steps taken other than "asking employees". Not surprisingly, Mrs. Varela continues to believe that her son was never involved with any drugs.

The Liquor Licence Board also FINDS

that the past conduct of Humberto Varela and Eduardo Varela affords reasonable grounds for belief that the business of the corporate licensees will not be carried on in accordance with law and with integrity and honesty. The Board does not doubt Mrs. Antonia Varela's intentions nor her personal honesty and integrity. The Board has a great deal of sympathy for Mrs. Varela as a mother and acknowledges that the family investment represented by the business and the real estate is substantial. But the Board has a great responsibility to the public to ensure that the business under a liquor licence will be carried on in accordance with law and with integrity and honesty. Mrs. Varela was unable to curtail the criminal activity that her son and employees conducted in the licensed premises. Even if Mrs. Varela resolved to run the establishment without interference from her son and husband, the Board is convinced that she could not assert her own management and resist the influence of her family.

The Liquor Licence Board revoked the licences as of September 26th, 1988. A Notice of Appeal and Request for a Stay was issued on September 14th and the stay was granted on consent on September 19th.

On October 25th, a Notice of Hearing was issued returnable in Niagara Falls on November 28th. Counsel for the licence-holders was not available on that date, and counsel for the Liquor Licence Board would not consent to an adjournment. The hearing began as scheduled and the adjournment was sought by the new counsel for the licence-holders. An adjournment was granted but the stay order was revoked. Counsel for the licence-holders was successful in having the stay replaced at Motions Court on November 30th.

A new date for the hearing of the appeal was arranged for April 7th, 1989 and a further adjournment was agreed to on consent to June 27th.

At the hearing, Mr. George A. Marron, Q.C. appeared as counsel for the licence-holders and Mr. Richard Kulis was counsel on behalf of the Liquor Licence Board of Ontario. As preliminary matters, the Tribunal was informed by counsel for the Board that

the items in the 1st, 2nd, 3rd and 5th particulars would be presented as in the written record of the Liquor Licence Board in this matter and that no specific evidence would be called concerning those items.

The Board would base the revocation of licences entirely on the narcotics matters and evidence was presented in that regard. Counsel for the Board proposed to show that the marketing of illegal drugs permeated the business of Studio One; that Humberto actively participated and was convicted; that Eduardo was also active or at least knew of the trade; and that Antonia knew of the trade. Revocation of the licence should occur in his view solely because of the conviction of Humberto who was the sole officer, shareholder and director of a company which owns a one-half interest in the licensed business of the hotel.

Constable Douglas Kane is a 12-year veteran of the Niagara Regional Police Force and is a senior operator on a combined team with RCM Police which investigates drug trafficking. An undercover project using Constable Anthony Upshaw, RCMP, began at Studio One on April 13th, 1987 with Upshaw being a workman in a renovation crew. Cocaine was purchased from Michael Stewart at the Mint's lounge in the hotel by Constable Wally Babenko, RCMP, on four occasions and Stewart was arrested on June 4th. Stewart appeared to be the doorman at the hotel and was dressed like the staff although the Varelas denied that he ever was one of their employees.

A second stage of the project began on November 27th with Constable Upshaw as the undercover agent. A purchase of cocaine was made and an employee was eventually charged. A second purchase occurred on December 3rd and two employees were eventually charged. On January 6th, 1988 a major purchase was arranged from Humberto Varela and with delivery occurring the next day, charges were eventually laid against him and another.

The following week on January 14th, an order was apparently placed for a purchase with Eduardo Varela and an employee, and both were eventually charged. In each of these events, marked money was handed over and the drugs were picked up behind the washroom door or in an alcove or elsewhere without the actual provider being seen.

On January 19th, a major purchase of seven ounces of cocaine was attempted from Humberto Varela but for ten days one reason after another postponed the transfer. A raid on February 2nd with Search Warrants under the Criminal Code and Narcotics

Control Act saw the arrest of the various parties. Six ounces of pure cocaine, 7 \$100 "decks" of cocaine, baby bottle liners for packaging and sets of balance scales were also found. In the hotel room used by Antonia and Eduardo Varela some \$81,000 mainly in fifty and one-hundred dollar bills was found. Four of the marked fifty-dollar bills were in the \$5,000 in currency found in a microwave oven, and 25 of the marked fifty-dollar bills were in with some \$30,000 found in a freezer compartment. The marked money was part of the funds used in the purchase of January 7th and 15th in which Humberto Varela, Mark McRae and a dancer were involved.

On May 10th, 1988, convictions were obtained based on guilty pleas as summarized in the Liquor Licence Board decision. Any charges against Eduardo and Antonio Varela were withdrawn. The seized money less the marked bills was returned to them. Constable Kane noted that the marked bills were in sequence as found and that accordingly they were not likely to have been received in bar cash and later removed for safekeeping by the Varelas; and further that Antonia Varela had control of the cash in the establishment. Apparently no offenses of any kind had been recorded at the hotel since February, 1988.

Constable Upshaw in his evidence reviewed the sequence and details of events as outlined by Constable Kane. In his opinion, Humberto Varela and Eduardo Varela knew of the drug situation and from nine to twelve employees and other persons were involved. Upshaw never had anything to do with Antonia Varela.

Constable Mark Lightfoot is a 10-year member of the Niagara Regional Police Force and serves in the Criminal Investigation Branch. His evidence expanded on the detail set out above in the decision of the Liquor Licence Board.

Counsel for the licence-holders called Antonia Varela as a witness. Now 54, she came to Canada from Portugal in 1970 with her husband, Eduardo and their then 12-year-old son, Humberto. A hairdresser with a business in Portugal, she first cleaned rooms in a hotel and then qualified as a hairdresser in Ontario. She worked until the birth of her second son, Nelson, in 1973. Eduardo had owned a small mattress factory. He has little education and has not managed the hotel business. He was a construction worker in Toronto from 1970 to 1983.

The Varela family turned a small capital fund in 1970 into two successful poolhall businesses which were sold for a profit of some \$200,000 in 1984 which was in turn used to buy the "Prospect Hotel" in Niagara Falls with a mortgage outstanding thereon of \$510,000.

Since 1984, the Varelas have become the owners of:

	<u>Price</u>	<u>Equity</u>	<u>Mortgage</u>
1. Studio One (Prospect Hotel)	\$710	\$200	\$510
2. 5954 Symons House	64.5	4	60.5
3. Flaming Steer Restaurant and parking area	350	80	270
4. 5965 Barker Street House	79	15	64
5. 5967 Barker Street 4-plex	125	30	95
6. 5945 Barker duplex	75	75	0
7. Bldg. near hotel with 2 stores and 2 apts	112	57	55
	<hr/>		
	\$1,515.5	\$461	\$1,054.5

It is assumed that the various mortgages are now somewhat less due to payments and that the capital values of the properties have increased. The restaurant had been leased for \$35,000 and bankruptcy occurred by that lessee: after which it was re- leased for a further \$35,000 so that these capital additions assisted in providing the capital for the later house purchases; which are owned by several limited companies. The increased value for the successful Studio One Hotel has made this family millionaires.

The licensed business was put in effect in half-ownership for Humberto Varela to give him a stake and make him work hard for himself. Humberto's wife and two children have returned to Toronto while he has a room in the hotel and keeps busy managing and booking various strippers into the premises.

Antonia Varela virtually lives in the hotel and has apparently had the full force of management of the array of properties while her husband and her son have benefitted from her work. Her explanation of the \$80,000 in her hotel room was the need for a cash bar float and for funds to make the routine weekly cash payments of some \$16,000 to the strippers and staff after making necessary deductions for room and bar chits which were provided.

There were some 20 to 25 female and 10 to 15 male dancers employed in any one week and their gross pay was in the \$450 to \$475 weekly range. In addition there were some 40 full time and other part-time employees as waiters, food service persons and preparation staff, and bartenders.

The revenue for the Hotel was about \$200,000 per month with some 90% of patrons being young Americans who cheerfully pay the \$2 or \$5 cover charge for entry to this major entertainment location.

Mrs. Varela maintained a lack of knowledge as to books, bookkeeping, records, staff hiring, drugs, or liquor licence infractions. A series of book-keepers have not been able to keep proper records.

Mrs. Varela now employs an accountant and a manager to clear up the previous problems, create proper records and run a large business property. She says that her son Humberto was not involved in the business although he does book various of the girl strippers. He has signed a release of his and his company's interest in the business and Mrs. Varela proposes to transfer the entire business to a new corporation owned solely by her which is 775505 Ontario Limited. An application to accomplish this is before the Liquor Licence Board.

Now every account is paid by cheque which Antonia alone signs and banking is done daily. She collects from the various cash registers and the income has improved with price increases to some \$60,000 each week, of which up to \$15,000 may be gross profit. She has fired and barred all those involved in the events of February 2nd, 1988; and due to some health concerns, her husband Eduardo has no active role in the business other than to do some maintenance on the three gas furnaces and other plumbing in this older building.

The new general manager is Jurgen Schallenberg who has an MBA and began his duties on January 2nd, 1989. He had earlier been with a consulting firm who did a partial review of the business operations. He sees Antonia Varela as a strong-minded, hard-working business woman now with full control of the operations. Proper depreciation allowances would bring the net profit of the business to about \$30,000 per month, in his opinion. Audited monthly statements are being developed and staff meetings about drugs are held. No infractions of any liquor, criminal or other law has apparently occurred in the past year or so.

Paul Robert Heath acted as the Crown Prosecutor in the various drug charges and explained to the Tribunal that while Eduardo and Antonia Varela had keys to the various locations in the Hotel where drugs were found, and were in charge and control of the premises, there was not enough evidence to proceed successfully with the charges of conspiracy against them and those charges were withdrawn in exercise of his prosecutorial discretion.

Stanley Borkowitz is a chartered accountant who has directed the creation and maintenance of proper accounting records at Studio One since January 1989. All filings are current and internal controls are in place. The records as available of the various book-keepers are being sorted and new income tax and corporate returns as well as personal returns are being prepared for 1984 and since. Now Antonia Varela signs all cheques, approves all bills, does the banking and controls the cash.

In summary, counsel for the Liquor Licence Board said the revocation of this licence must occur because of the conviction of Humberto Varela who was a one-half owner and because Eduardo Varela certainly knew of the drug dealing at the very least. This is not a question of absentee owners or reliance on crooked managers, but rather involved three persons who were closely intertwined as family and in business operations as could possibly be. It was submitted that in addition Antonia Varela was fully involved in the business and knew of the drug source for so much money, even if she could not bring herself to believe it. All the drug purchases took place in the premises with either owner or employee involvement.

Following the raid on December 16th, 1987, and the further events leading to February 2nd, 1988 showed that if there was earlier innocence of these infractions, there had been no prevention of their re-occurrence. Antonia Varela is not a naive simple hard-working woman with language difficulties, but a shrewd, acquisitive financier with mortgages, corporations, leases, bank accounts, properties and tenants to supervise.

Since she is now clearly running the business, she must have had the skills to know a year ago about the drug matters. If she is naive and put upon by her husband and son, she will not have the strength to overcome their influence in the continuance of this licence; and the problems will continue. Counsel for the Liquor Licence Board suggests that in either case, the licences should be revoked.

Counsel for the licence-holders questioned the reliability of the notes made by Constable Upshaw and reminded the

Tribunal that recollection of exact statements and the inflection used with them can be faulty. Both Humberto and Eduardo Varela are to be out of the business if the transfers are approved by the Liquor Licence Board. He looked to the Tribunal to allow the licence to be continued by Antonia Varela on whatever terms and conditions for record-keeping, inspection and supervision would be found suitable.

In this hearing, the Tribunal has focused on the various narcotics offenses which led to certain convictions. The other particulars of the Liquor Licence Board are before us without additional evidence being called other than what is on the record.

The Tribunal notes that the granting of a liquor licence brings a duty of trust and that in this case serious breaches of that trust occurred. We find that there is sufficient evidence to uphold the decision of the Liquor Licence Board made on September 1st, 1988.

Therefore by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 1st day of September, 1988 whereby it revoked the liquor licence issued to 577029 Ontario Limited and 577030 Ontario Incorporated in respect of the Studio One Hotel, Niagara Falls.

NINA GIORTZINIS
(QUINTA RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL: RICHARD F. STEPHENSON Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES:

NINA GIORTZINIS, appearing on her own behalf

LAWRENCE DUCAS, representing Tom Sirillas

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 13 April 1989

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has deliberated and wishes to thank the parties to this hearing for having not unduly taken up the time of the Tribunal by admitting those facts which have been contained in the Proposal of the Liquor Licence Board.

The Tribunal finds, however, that on the basis of that acknowledgment of the facts presented in the Board's Proposal, it must find from those facts that the Licensee in fact is Mrs. Nina Giortzinis, but that in reality over a number of years the operations of the Quinta Restaurant have been conducted by Mr. Tom Sirillas and/or his company, Giorillas Holdings, Inc., both of whom are unlicensed operators, that is unlicensed under the provisions of the Liquor Licence Act.

That being the case, looking at the operations as they have been conducted from these premises, the Tribunal finds in fact that the operators have issued cheques that were not honoured by their bank or by its bank in the case of Giorillas Holdings, Inc., both to the Liquor Control Board of Ontario and to the Ministry of Revenue in respect to retail sales tax payments. The Tribunal also finds that inadequate and insufficient records have been kept with respect to the operation of the premises, that in fact on several occasions at least liquor, not purchased through the Liquor Control Board of

Ontario, has been brought into the premises and served and, in fact, that convictions have been registered for breaches of the provisions of the Liquor Licence Act.

All of these facts, as I have indicated, have been acknowledged by the licence holder, Mrs. Nina Giortzinis, and by Mr. Sirillas and his company, Giorillas Holdings, Inc., through their legal counsel. And all of these matters so acknowledged, indicate conditions under the provisions of Section 6(1) of the Liquor Licence Act which permit a licence to be revoked, in particular, clause (a) of Section 6(1) that "having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business". In this particular instance, no evidence has been put before the Tribunal with respect to Mrs. Giortzinis, but as the Tribunal has found with respect to the factual operation of the Quinta Restaurant, evidence of lack of financial responsibility has been exhibited by at least Giorillas Holdings, Inc.

Furthermore, the provisions of clause (c) of Section 6(1) provide that "the past conduct of the applicant affords reasonable grounds for belief that he (or in this case she) will not carry on business in accordance with law and with integrity and honesty". Again the facts before the Tribunal indicate that there has been a failure to comply with the provisions of the Liquor Licence Act in respect to the applications filed by Mrs. Giortzinis, by the fact of the renewal filed and signed by Mrs. Giortzinis, and with respect to the operation by Mr. Sirillas and by Giorillas Holdings, Inc., the facts of convictions have to be noted by this Tribunal, together with the violations as set out in the Proposal by the Liquor Licence Board. All of which indicate to the Tribunal that there is a failure of the operator in this instance to carry on business in accordance with law and with integrity and honesty.

In addition, clause (e) of Section 6(1) provides for revocation if "the applicant is carrying on activities that are, or will be, if the applicant is licensed, in contravention of this Act or the regulations". The admitted facts clearly indicate that Mrs. Giortzinis is not operating the business at this time, therefore, the activities will not apply to her as such, except in the capacity that she is, in fact, the licence holder and is permitting an unlicensed operator to conduct the business.

With respect to Mr. Sirillas and Giorillas Holdings, Inc., however, the acknowledged facts before the Tribunal of the continued violations of the Act from the date of the Proposal originally in March of 1988 and following the adjournment in January of this year, is further evidence to this Tribunal that that operator, although not officially an applicant or a licence holder, has demonstrated that the operations will be carried on in contravention of the Act or the regulations.

The Tribunal, therefore, is of the view that it is in the best interests of the community and, in fact, of the Applicant or licence holder herself and, in fact, that of Mr. Sirillas and his company, that the licence should be revoked in these premises. Accordingly, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby directs the Liquor Licence Board to carry out its Proposal as contained in its Proposal dated March 14th, 1988, and amended January 20th, 1989, and that such revocation shall take effect immediately.

JAMES DAVID HALLWORTH
(FROSTY MUGGINS RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL; JAMES GRAY LESLIE, Vice-Chairman, presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES;
J. SCHEULDERMAN, representing the Applicant
RICHARD E. KULIS, representing the Liquor Licence Board
LAURENCE SILVER, agent, for Dr. B. Thorne

DATE OF 26 April
HEARING; 3, 8 May 1989 Kingston and Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by James David Hallworth, owner of a restaurant known as Frosty Muggins from the Decision of the Liquor Licence Board of March 14, 1989, which revoked the liquor licence thereby closing the establishment.

On August 5, 1988, the Board issued its Notice of Proposal to revoke the licence on the following grounds.

The Board hereby proposes to revoke the liquor licence of the licence-holder, pursuant to subsection 10(3) of the Liquor Licence Act, because:

- (a) the past conduct of the licensee affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;
- (b) in addition to and in the alternative, the licence-holder is in breach of a term and condition of his licence;
- (c) in addition to and in the alternative, the licence-holder is carrying on activities that are in contravention of the Act or the regulations;

- (d) in addition to and in the alternative, the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Particulars are that contrary to section 43 of the Liquor Licence Act, the licence-holder sold or supplied liquor or permitted liquor to be sold or supplied to a person in or apparently in an intoxicated condition; or contrary to subsection 8(4) of Regulation 581 R.R.O., 1980 and amendments thereto, the licence-holder permitted drunkenness or riotous quarrelsome, violent or disorderly conduct to take place in the licence premises".

On September 1, the licensee requested a hearing before the Board and it was accordingly held in Kingston on January 10, 1989. Evidence was given on behalf of both the Board and Mr. Hallworth and the Board's decision rendered on March 14, 1989. Revocation of the licence was made effective as of the 3rd day of April, 1989. Frosty Muggins has as a result remained closed since that date.

It is clear from the beginning that Frosty Muggins is not the simple ordinary type of licensed restaurant. Situated at the intersection of Highway 38 and Sydenham Street in the Village of Harrowsmith, approximately five miles from Kingston, it is more of a roadhouse tavern to which the majority of people must drive. The few inhabitants of Harrowsmith are the only people within walking distance. This is a factor which obviously had some bearing on the Board's decision.

The first witness called by the Board was one Cory Riddle. He said he arrived at the restaurant on August 19, 1988 at about 8 p.m. with two friends and consumed three or four beers but had nothing to eat. During that time, he had been served by a waitress but no attempt was apparently made to check his identification. Later in the evening he felt nauseated and went out to the parking lot to sit in the car. At that point Constable Corcoran came along and took him to the police station since Riddle had been sick beside the car and was, in Corcoran's opinion, intoxicated. Our observation of Riddle's appearance leads us to the conclusion he could hardly be mistaken for a man who had reached the legal drinking age. Constable Corcoran, in fact, thought him to be younger than 16. It was just shortly after Riddle's 16th birthday that this incident happened.

The next witness, Constable Corcoran an O.P.P. Officer since September 1986 engaged in liquor and drug enforcement, observed that he had made notes on every occasion within a half hour of each incident that he would relate. He testified that on Sunday, January 24, 1988, he was in a police cruiser when a pick-up truck came out of Frosty Muggins' parking lot, cut him off and proceeded through a stop street. The office gave chase but the driver eluded him eventually leaving the truck and running into a field. Later in the evening, Corcoran saw the driver, one Kevin Johnston, in Frosty Muggins. His clothing indicated he had been running through brush and still had burrs on it. In conversation with Mr. Hallworth, Corcoran said Hallworth told him Johnston was with him the whole evening. The incident resulted in Johnston's arrest and conviction. Corcoran further testified that he saw about 30 people in the bar that evening, 15 of whom he considered impaired.

On April 8, 1988, on patrol in the Village, Corcoran stopped a vehicle with faulty headlights which was leaving the bar at 12:04 a.m. The driver, one Holland, had a breathalyser reading of 190 milligrams and pleaded guilty to that offence.

In another incident involving Kevin Johnston on July 17, 1988, Corcoran saw him in the parking lot of Frosty Muggins with a beer in his hand enter his truck and drive wildly down the road westbound in the wrong lane. It almost resulted in a collision with an eastbound vehicle at the crest of a hill. After Johnston was stopped the officer opened the door of the truck and a beer bottle fell out. Johnston was subsequently arrested with breathalyser readings of 211 and 222 milligrams.

On a subsequent occasion, August 9, 1988, Corcoran stopped Johnston as he left the parking lot of the restaurant with no tail lights on his truck. His breathalyser readings at that time were 130 and 140 milligrams.

On Sunday, April 17, 1988, Corcoran and one Constable Salisbury arrested the driver of a vehicle backing out of Frosty Muggins' parking lot who had apparently combined alcohol and drugs and had to be carried from his vehicle. The driver identified as one Neil Truscott was later taken to hospital.

At 1:02 a.m. on patrol with one Constable Flagg, Corcoran noticed two cars driven erratically out of the restaurant parking lot. The drivers, one male and one female, on being given breathalyser tests registered 150 and 140 respectively.

On Friday, July 15, 1988, at 11:02 p.m. on patrol past the restaurant, Corcoran noticed the occupants in a van parked at the restaurant parking lot, drinking beer. He stopped and spoke to the driver whom he assessed as impaired and noted a quantity of liquor in the van. During his conversation with the driver, Mr. Hallworth came out of the bar with five men and demanded to know what he was doing in the parking lot. Corcoran recalls it as an intimidating experience but nevertheless arrested the driver of the van who was found to have blood alcohol level of 180 milligrams.

On Sunday, December 18, 1988, in passing the restaurant alone in a cruiser, he observed a three-wheel bike in the parking lot of the restaurant. He arrested the driver of the bike who had no helmet and no bike lights and this man's blood alcohol level was ascertained to be 270 milligrams. The time was 4:08 a.m. on a Sunday.

It would serve no useful purpose to recount any further incidents which engaged Constable Corcoran's time. While we cannot say from his evidence that the condition of all the impaired drivers he encountered at Frosty Muggins could be attributed to that bar, it is evident that a pattern has been established since the restaurant seems to have been a haven for them. There was obviously a high police profile in that area because, as Corcoran admits, the frequency of these incidents concerned them. The presence of the police, however, did not seem to deter the impaired drivers.

Mavis Babcock who resides at Harrowsmith testified that the restaurant had a serious detrimental influence on the community. She is secretary of the local organization against drunk driving and had compiled a petition of some 300 names against the continued operation of the place. She pointed out that four deaths had occurred in the past two years involving drinking and driving in the area and two of the victims were related to her. She recalled that she had no objection to the restaurant being licensed initially and "if it operated according to the rules would have no objection to it now".

John Franklin Craig, another resident, gave evidence that he was deeply concerned about under-age drinking. He said his son was served at the bar when he was only 16 years of age. He also recalled the fatalities.

Kevin Johnston, who had been arrested several times for

impaired driving, testified that he had on one occasion, before he was arrested, had several beers at Frosty Muggins. On July 17, 1988, he said he had been drinking all day at a friend's house and then went to Frosty Muggins to be served more beer. His readings, when arrested at that time, were 211 and 222 milligrams.

He did, however, admit that he was often cut off at Frosty's when Mr. Hallworth considered he was drinking too much.

The Postmaster of Harrowsmith for 22 years, Rosemary McCarthy, also gave evidence since her office is located next to the restaurant. She said she was not opposed to the initial licensing of the place, but has had numerous problems with it since. She has had three broken windows and is continuously sweeping up glass which comes from the parking lot. Her main complaints seemed to involve bad language, loud music, particularly on weekends, and patrons using the parking lot as a urinal. She states further that she cannot mow the lawn because of the broken glass. She says she has complained to Mr. Hallworth but it has done no good. Under cross examination, however, she admitted that the noise of the music has decreased since the last Liquor Licence Board hearing.

A resident of Harrowsmith for 27 years, one William Bruce, gave evidence that he had no objection to the restaurant receiving a liquor licence. When, however, his 16 year old boy came home from there in an intoxicated condition, he changed his mind.

A Mr. Arthur Parker operates an antique business in his premises which also accommodates his residence. He is almost across the street from the bar. As previous residents have testified he also had no objection to the presence of a licensed restaurant in the immediate vicinity of his home. Now, however, he considers it responsible for the "overall downgrading of the area". Noise at night combined with fighting has had a deleterious effect as a result of which land values have declined and his assessment has been decreased by 10%. The appellant counsel has tendered evidence by affidavit from a local real estate agent which does not seem to corroborate Mr. Parker's opinion. It appears Mr. Parker has his house and business for sale for \$468,000. Mr. Parker's main complaint, however, seems to be the noise coming from the restaurant in the early hours of the morning. He admits, however, that "things have quieted down because of the police visits and the notoriety in the newspapers".

One George Cronk, who appears to be a local legend because of his tolerance for alcohol, was also called by the Board's counsel. He recalled an incident on July 15, 1988, when he and a friend were what he termed as "road touring" - drinking beer and driving on the back roads. He said he drank a whole case of beer "24 bottles" by himself that day and arrived at Frosty's between 7:30 and 8:00 p.m. where he consumed six more bottles of beer. When the police officer accosted them his friend, Rusty, "got busted for impaired driving". He also observed that Mr. Hallworth was aware of his drinking habits and he had on occasion been cut off and sent upstairs to sleep. We note, however, that he has never been barred from the restaurant.

Beryl Hamilton, a resident there of 33 years had no objection to the licence being initially granted. Since then he has been disgusted with the behaviour of some of the patrons. On a Saturday, two men and a girl came out of the restaurant and one of them urinated on the sidewalk in front of him. He was so infuriated he wrote to his Member of Parliament. On another occasion, he saw a couple making love on the patio which he finds morally offensive. He complained to the police about this incident. Driving home from the doctor's office with his wife in the middle of the afternoon, he was confronted by three men in the middle of the road fighting over a girl. He said he had to brake suddenly to avoid striking them. "You wouldn't get my wife in there if you tied and gagged and dragged her", he said.

Mr. Hamilton's views may represent an extreme position, but nevertheless they are indicative of a perception certain people have of this establishment borne out of the conduct of some of the clientele.

The last witness called by the Board was Constable Joseph Albrecht, an officer with ten years' experience with the Ontario Provincial Police. He is stationed in Kingston and Harrowsmith is part of his patrol area. We might point out the Tribunal was most impressed with his evidence which we consider he gave fairly and sincerely and with no attempt to colour it. Instead, the accent seemed to be on his attempts to reason with Mr. Hallworth for the benefit of all concerned. He said it became obvious to him that there was a problem with Frosty's and, therefore, the police placed a lot of emphasis on patrolling that area because of the numerous impaired drivers. Initially the police would patrol there but it seemed to make more sense to spend their time around Frosty's when they would be able to tell patrons not to drive. "Some came out so drunk they could not stand up - yelling - swearing", and one came out with a beer mug which the officer returned.

Albrecht talked to David Hallworth telling him people were still coming out drunk. The response was that he had no

breathalyser. Continuing Albrecht told of half a dozen people in the place last year completely drunk and one girl passed out. His conversations with Hallworth bore no fruit. One fellow with a reading of 270 milligrams with some companions had driven his truck into a ditch. Albrecht called Hallworth about it but was told they had been served there but were in the bar for only a short time. Albrecht felt that someone from Frosty's should have called the O.P.P. to tell them that these drunks would be driving.

On April 1, 1989, Albrecht was outside the restaurant when a person came out and almost had to be carried to his car. Many more came out, in his opinion, intoxicated and two people had to be assisted to walk out of the place. This was two days before the restaurant was closed.

His conclusion is that he sees no difference between it as a licensed restaurant and a bar. In his opinion the basic complaint of the community is that Frosty's has changed the character of the area. People cannot sleep, foul language is pervasive, urination on the streets and a litter of beer bottles is frequent. Finally, under cross-examination he said he had told Mr. Hallworth that he could not understand how these people so highly intoxicated could have been served by his staff and he doesn't need a breathalyser to ascertain a condition so evident.

The first witness called by Mr. Scheulderman on behalf of Mr. Hallworth was one Michael Coleman who resides five miles west of Harrowsmith. He is an employee of the Provincial Government, Department of Environment and said he stops at Frosty's about once a week for an hour or two to eat and have a drink. He calls it a typical roadside restaurant with bands and dancing on occasions. His observation is that there is a happy group there and only on one occasion, when was someone denied a drink, did he see any drunken person. This person was with two others who "were not too bad", but one pushed Mr. Hallworth and threw a beer bottle. The matter was eventually settled by the police.

The next witness, Edna Denning, is a village resident living opposite the premises of a former witness, Mr. Parker. She had lived there for ten years and has frequently been at the restaurant for meals, and for pre-dinner drinks with friends. She remembered some occasions when people were refused service. Her 17-year old daughter and her son have both worked at the restaurant, the son

in the capacity of a cook. She says her son had often driven people home who were under the influence. In summation, she says that the attitude of the management has changed. She would permit her 19-year old daughter to go there and would be prepared to recommend it to her friends.

Doris Robertson, a very gentle lady, lives in Kingston and has a married son living in Harrowsmith. She and Mr. Hallworth, Senior, are friends and whenever she is in the village she drops into the restaurant. On one occasion she recalls three boys coming in inebriated. One was served coffee only and then they left.

Richard Morgan has resided some 50 feet away from the restaurant for the past two years. He has not been disturbed by noise since he has been there. He has been to Frosty's for lunch frequently and once per month in the evening for a couple of drinks. He has seen people there intoxicated and refused service. He points to a noticeable improvement since it first opened. He says he likes to walk at night, but has never seen anyone being carried or assisted from the bar. Under cross-examination, however, he admits that he may have told Constable Albrecht that last summer he had seen people fall down drunk.

Another witness living in the vicinity of Mr. Morgan, one Glen Schauf, is a caretaker for the County Board of Education. His visits to Frosty's have been during the week and he recalls a man "coming in loaded" who was refused service. He found no problem with noise and said he would like to see the restaurant reopened.

A Mr. William Hartwicke, who lives in the same building as the previous two witnesses, occasionally patronizes Frosty's. He experiences no problems with noise from the bar and sees nothing unusual in patrons at night. He observed that he has seen people in the restaurant "not overly intoxicated".

Stewart Priest, a resident of Yarker for seven years, is one of the daily regulars at Frosty's. Yarker is a community apparently not far from Harrowsmith. He is seldom there in the evenings but has seen people come in inebriated on several occasions. He points out, however, that they were refused service except for coffee.

A waitress, Colleen Levere, has worked at Frosty's since March 1988. Her hours were from 11 a.m. to 6 p.m. and some Sunday evenings. She testified that Mr. Hallworth told her the licence

was suspended and in future strict rules were to be observed to comply with the regulations. She said that she had suggested at times the intoxicated persons who came in occasionally be served coffee. Her observation of the daily clientele was that they are mainly business people and tourists and far more food was served during the day than alcohol. She said that Mr. Lou Merke, the local liquor inspector, has never complained to her about anything. It appears from her evidence that a doorman was employed on Friday and Saturday evenings.

Ella Timmerman, who resides in Sydenham, has been a waitress for five years. She worked at Frosty's in 1985 and then returned in March of 1988, working until September 1988. She says she worked seven days per week from 6 p.m. until 2 a.m. She recalls that in 1988, Mr. Hallworth became much more strict and both the menu and food had been improved. She did not consider there was any need for many staff meetings since Mr. Hallworth was always there. She had to watch for age of majority cards and also for those appearing intoxicated.

Ms. Timmerman says she was aware of the regulations and came to the point in cutting off patrons of serving three drinks and then offering coffee. She said further that she made a point of talking to patrons "to see if they were okay". Balance, slurred speech and the number of drinks per hour were tests employed by her to gauge the patron's condition. She then assured the Tribunal that if a patron was intoxicated, he or she was always offered a ride home. Frosty's she said is much stricter than the other four bars in which she has worked.

She pointed out that she was working during the night of August 19 when a previous witness said he had been served in the bar, but she neither served him nor even saw him that night. The previous witness, of course, was the 16-year old Cory Riddle.

Under cross-examination with regard to the regulations prescribed by the Liquor Licence Act, she acknowledged she had seen only one page of a brochure containing nine points which were designed to acquaint the personnel with the regulations. She said she would serve three drinks in two hours with a meal and three drinks in an hour-and-one-half without food. With regard to the witness, George Cronk, she said she would not cut him off after three drinks since she could not tell if he was impaired and 30 beers in a ten-hour period would not make him visibly impaired. She concluded her evidence by saying she had occasionally driven people home, the implication being that they were in no condition to drive.

Mr. Hallworth's accountant giving evidence by Affidavit which was admitted, submitted a statement of sales and purchases of

liquor and food from 1984 to 1989. We consider, however, only the years 1988 and 1989 to be relevant since the calculations for the previous years were incomplete. It is clear from these figures that the sales of beer and alcohol increased considerably from March 1988 to March 1989, while the sale of food decreased sharply from 38.4% to 22.7%. These figures may not now be relevant in view of the new regulations, but are indicative of the trend away from a restaurant to a bar.

One Joanne Horton, who worked at Frosty's as a waitress from July 1988 to mid-March 1989, in her Affidavit deposes as follows: "Since commencing employment at Frosty Muggins in July 1988, it has been stressed to me several times by Mr. Hallworth that the staff are to be vigilant with respect to monitoring patrons' consumption of alcohol and assessing patrons who come in as to their state of intoxication so that no one is served to the point of intoxication in our premises. It has been stressed to me personally that this is extremely important, as is the requirement that age of majority cards or other satisfactory proof of age be requested and provided by any patrons who appear as though they may be under the age of nineteen years. I have followed these instructions without exception and have on a number of occasions been required to cut patrons off from any further alcohol service or to refuse them alcohol service initially as a result of my assessment that they are exhibiting signs of intoxication".

A further Affidavit admitted in evidence was by one David Bechthold, a real estate sales agent residing in Harrowsmith which tends to rebut the claim of Arthur Parker that property values in the area have deteriorated because of the operation of the restaurant. Bechthold finds it "a comfortable place to take clients at any time of the day or evening".

Mr. David Hallworth was the last witness called by Mr. Scheulderman. In his own words, he is the owner, the bar tender, the cook and also the janitor. He had attended the course prescribed by the Liquor Licence Board and had staff in for three days to familiarize them with the regulations governing the sale and service of alcohol. He said every young person coming in was to be identified by their identification card and the photograph attached to it.

He also said he had complied with the conditions set by the

Board which had resulted from his previous suspension of six weeks in 1988, and introduced further measures to ensure the neighbouring houses would not be subjected to any inordinate noise. Styrofoam panels had been cut to fit the west windows and were in place when live entertainment was taking place. He says he tried to introduce a free-ride service but his insurance company discouraged it. This intention, however, may indicate the necessity of having such a service. He appears to have a good relationship with the local liquor inspector (who was not called by either party) who he says is rigid in his inspections and has never since 1983 given him a bad report. He admits his conviction and fine of \$1,000 in Provincial Court in the incident involving the 16-year old Cory Riddle but indicated it was under appeal. He was adamant that Riddle was not in his premises on the evening concerned.

As far as the liquor and food sales are concerned, Mr. Hallworth rationalizes the sharp decrease in food as opposed to liquor because of the change in the menu. The daily food special priced at \$3.99 means less revenue but nevertheless a greater quantity of food is sold since by far the greater bulk of food sold is the special.

Hallworth's relationship with the police does not seem to be a pleasant one. We impute the fault for that to neither but it simply seems to be a fact. He said that Constable Albrecht came in on an occasion during the summer of 1988, when five patrons were alleged to be intoxicated. The officer asked him how he could serve people like that but before he could reply he said the officer left. He does not deny they might have been in that condition but points out they had come in just before the officer and that the beer on the table in front of them had belonged to previous customers. Asked if spoke to the OPP about why they were patrolling his area so frequently, he said Constable Albrecht told him that the high incidence of liquor and driving offenses related to his place made it necessary. He continued saying he had received no specific information from them but it was only in general terms. It also appears he believes there is a faction in the area opposed to him regardless of how he operates his restaurant. This, however, has not been borne out by the evidence.

If his licence is restored, Mr. Hallworth said he would continue staff meetings, would relate to the evidence heard here in order to ensure there would no repetition, and would attempt to have open discussions with the area citizens to avoid any future problems or misunderstandings.

With regard to the evidence we have heard, Mr. Scheulderman raised at the conclusion of the hearing the defence of *res judicata* which he argues applies to the evidence involving Cory Riddle. Hallworth was convicted in the Provincial Court of an offense under the Liquor Licence Act presumably Section 44.1 or 2, although that was not made clear. There was, however, some evidence that the matter was under appeal. We find that the defence of *res judicata* or *autrefois* convict do not apply in this case because the Liquor Licence Act as well as providing for a fine under Section 55.3 also provides for the additional penalty under Section 55.2 of a Minimum Suspension of Licence. It is not, therefore, a case of double jeopardy but a matter of the Liquor Licence Act providing the further penalty of suspension of the Liquor Licence as well as the personal fine. It is thus unnecessary for us to deal with any other reasons.

Section 11 of the Charter of Rights has also been argued but in view of the evidence of an appeal, we cannot find that a final disposition of the matter has been made. Mr. Hallworth may yet be acquitted.

Section 11 of the Charter of Rights provides that "any person charged with an offense has the right

(h) if finally acquitted of the offense not to be tried for it again and, if finally found guilty and punished for the offense, not to be tried or punished for it again.

The word "finally" implies a close, a termination and an end to the proceedings and does not contemplate any further appeal. We cannot find, therefore, that the Charter has any application in this circumstance. As a result we do not find it necessary to deal with any other aspects of this argument.

This has been a long and difficult matter because the tavern seems to have acquired the schizophrenic disposition of a Doctor Jekyll by day and a Mr. Hyde by night. It performs a useful and perhaps even necessary service to its noon-time customers, a service which may even extend into the early evening. Only after 9 or 10 p.m. does it seem to change complexion becoming nothing but a bar and catering to a more unrestrained clientele. This is borne out by the evidence of the many witnesses who have come forward to express the needs and wishes of the community and the concerns of the police. We find as a fact their evidence is uncontroverted despite attempts on the part of witnesses for the applicant to gloss over the true situation.

There is, however, another factor to be considered. Despite a petition of some 300 names requesting the tavern be closed, there

is a certain number in the community which welcomes the tavern using it frequently for lunch and often in the evening for a drink and entertainment. It would be unfortunate to penalize them simply because this facility was not being properly operated. In saying that we are mindful of the fact that none of the witnesses for the Board who now support the revocation of this licence were initially against it. The evidence is that they welcomed a licensed restaurant in the area and it was only when the shabby operation of the tavern became evident that their opposition to it grew culminating in its suspension on April 3rd last.

We neither condemn nor condone the behaviour of the appellant in the conduct of his business, but must point out it is blatantly clear to this Tribunal that he has operated the tavern purely for his own gain and to the detriment of the community. The accent has been on the indiscriminate sale of liquor at the expense of food in the evenings. Drunkenness has been permitted and excessive consumption permitted if not encouraged. Two fatal accidents have occurred in the area in the past two years and although we impute no fault to Mr. Hallworth in these events, the evidence is that liquor was involved in both cases and the majority of people attending at his premises must drive. Police officers are constantly in attendance, not for the purpose of arresting impaired drivers, but to prevent them from driving. The tavern was closed by order of the Liquor Board for six weeks a little over a year ago. The licence was reinstated on conditions and these do not seem to have been seriously observed. The Board now wishes the tavern closed which would provide a quick and easy solution to the concerns of both the police and the many members of the community. We do not, however, consider that revocation of the licence is a reasonable resolution of the matter. We come to this conclusion because of the obvious disparity between the way the establishment is operated during the day and the manner in which it deteriorates in the evening.

The several hundred area residents disposed to use the restaurant and bar must drive some miles into Kingston for the same facility. The tavern provides some employment for area residents. The photographs entered in evidence indicate a well-furnished and appointed restaurant which requires only proper management. There is evidence that Mr. Hallworth has made an attempt to bring some degree of order and respectability to the place since his licence was restored. These are points in favour of the business continuing but not on the basis on which it has been operated. Mr. Hallworth must realize that his whole investment is in jeopardy and we do not believe he would be willing to put it at risk again.

Weighing all the factors, it is, therefore, our decision that the tavern shall remain closed until 11 a.m. on August 28th next and that the hours of operation for a period of one year thereafter be from 11 o'clock in the forenoon until 11:30 p.m. daily, after which the hours shall be determined by the Liquor Licence Board. During that period Mr. Hallworth shall provide food service in accordance with the present regulations and any amendments thereto. We would strongly recommend also that this be monitored periodically by the local liquor inspector. We would also recommend that any complaints received by the police be also directed to Mr. Hallworth in order that a reasonable and amicable line of communication be established between them.

In conclusion, we may add that there is some evidence of a sale of the premises to one Dr. Thorne. This, however, now appears to be the subject of litigation. Nevertheless, Dr. Thorne has been granted status before the Tribunal because of the contemplated transfer of the licence and his representative, Mr. Silver, has made certain submissions in writing outlining his client's position. Since, however, Dr. Thorne gave no evidence and the matter of the sale is sub judice, the submissions have not been considered in this decision.

PATRICIA HARTIG, MADELEINE HARDEN, ALBERT J. DUMOUCHELLE

IN THE MATTER OF
679604 ONTARIO LIMITED
(BERRINGER'S TAVERN RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO GRANT the application as amended for a Dining
Lounge Licence subject to the TERM AND CONDITION
prohibiting the sale and service of beverage alcohol
after 12:00 midnight and subject to the Applicant's
undertaking to have no adult entertainment;

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

PATRICIA HARTIG, appearing on her own behalf

ALBERT J. DUMOUCHELLE, appearing on his own behalf

JOHN REDDAM, representing M. Harden

ARTHUR M. BARAT and AVRIL A. FARLAM
representing 679604 Ontario Limited

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF
HEARING: 14 March 1989

Windsor

REASONS FOR DECISION AND ORDER

This was a hearing before the Tribunal arising out of the decision of the Liquor Licence Board to grant a Dining Lounge Licence to 679604 Ontario Limited carrying on business as Berringer's Tavern Restaurant (hereinafter referred to as "Berringer's"). On May 9th, 1988 the Liquor Licence Board of Ontario issued a Proposal not to issue a licence to Berringer's. The Board conducted a full hearing on August 11th, 1988 and issued a decision October 13th, 1988 granting a Dining Lounge Licence subject to the conditions the sale and service of beverage alcohol would cease at 12:00 midnight and

that there be no adult entertainment. It is from this decision that the Applicants appealed and required this hearing of the Tribunal to be convened.

The following chronological facts are not disputed. In 1937, on the location currently known as 1521 Riverside Drive West in Windsor, the Coronation Hotel commenced business. In 1948, the City of Windsor enacted a zoning by-law which designated the site and the area adjacent thereto as residential. The Coronation Hotel/Tavern thereupon became a legal non-conforming use under the Planning Act of Ontario. On December 1st, 1959, Stella Martinek bought the Coronation Tavern and continued its operation. Evidence was presented indicating that the operation of the Coronation Tavern by Stella Martinek was fraught with problems of management, Liquor Licence Act violations, interference in the neighbouring residential area. These resulted in a number of suspensions of the licences of the premises.

On April 12th, 1985, Stella Martinek was declared mentally incompetent. In January 1987, 679604 Ontario Limited bought the Coronation Tavern from the Committee of the Estate of Stella Martinek. At that time, there was a licence #091155 in existence.

In February 1987, the new owners applied for a building permit to repair the tavern premises. On February 26th, 1987 as a result of arson, the Coronation Tavern was set on fire. In June 1987, the licence for the premises was cancelled for failure to renew - the expiry date being April 30th, 1987. A letter dated June 11th, 1987, from the Board informed the solicitor for the owner that as a result, the owner would now have to make a new application for a liquor licence. Negotiations with residents and with appropriate departments of the City of Windsor ensued.

On December 15th, 1987, a building permit was issued for the reconstruction of the tavern by the City of Windsor. Albert J. Dumouchelle, one of the Applicants before this Tribunal hearing, commenced an action against the Building Commissioner for the City of Windsor to revoke the issuance of the Building Permit in January 1988.

After a public meeting in Windsor on April 7th, 1988, a Proposal not to issue a licence was made by the Board on May 9th, 1988. The action commenced by Mr. Dumouchelle was abandoned by Court Order, July 15th, 1988. On August 11th, 1988, the Board conducted a hearing in Windsor and by its decision dated October 13th, 1988 granted the licence to Berringer's referred to above. Berringer's opened for business on January 5th, 1989.

All parties before this Tribunal acknowledge that under the provisions of Section 6(1) of the Liquor Licence Act, Berringer's is entitled to be issued the licence unless disentitled under the specific matters contained in clauses (a) to (g) of that subsection. No evidence was presented to the Tribunal and no argument was made to the Tribunal that any of the conditions referred to in clauses (a) to (f) were applicable. The sole proposition to the Tribunal rested on the needs and wishes of the public in the municipality. In all of the cases cited to the Tribunal, the decisions of each Tribunal in this regard have clearly stressed that the onus is on the objectors to show that a licence should not be issued.

Much mention was made during the hearing with respect to the question of loss of the legal non-conforming use protection afforded to the subject premises by the Planning Act. Reference was made to the lawsuit commenced by Mr. Dumouchelle and of a possible investigation into the issuance of a building permit to the owners of the subject lands and other lands in the City of Windsor. Be that as it may, this Tribunal is faced with the current state of facts; namely, that with the discontinuance of Mr. Dumouchelle's action the building permit issued by the Building Commissioner of the City of Windsor, together with his letter to the Liquor Licence Board of Ontario dated April 6th, 1988, in which he indicates that both the Building Department and the Legal Department of the City of Windsor have deemed the subject property to be a continuing legal non-conforming use, there can be no finding of this Tribunal that the premises of Berringer's violates the zoning by-law of the City of Windsor. As counsel for the Board aptly pointed out, there are proper appeal processes in planning matters as set out in the Planning Act and this Tribunal is not part of that process.

That being so, this Tribunal must confine its review to matters required to be examined under the Liquor Licence Act. The Tribunal is entitled to take notice of the fact that a tavern has existed on the Berringer's site for fifty years, forty of those years being as a legal non-conforming use. Thus, if the licence which was subject to renewal on April 30th, 1987 had been renewed, the question of the needs and wishes of the community would not even be in issue. Why such licence was not renewed, perhaps in view of the fire in February 1987 or the question of repair or design problems or any other reason - would only be speculation. But it has resulted in the technical requirement of making a new application to grant a licence to what is now unlicensed premises. The Tribunal is also entitled to take notice of the

fact that all of the objectors who gave evidence clearly indicated that they acquired their residences knowing that the Coronation Tavern, albeit as a legal non-conforming use was located on Riverside Drive West at the intersection of Curry Avenue. While they may have thought that at some time in the future the premises would be changed to a residential use, they had no right to expect that this would happen.

In considering the Berringer's site, the Tribunal notes that in addition to its past existence there, the site is at the corner of Curry Avenue, that across the road on Curry Avenue is a multiple residential building and that across Riverside Drive West is a public park, including automobile parking facilities, and the Detroit River. While Riverside Drive has residences on the south side, there is only parkland on the north side at this location and west to the Ambassador Bridge and, therefore, Riverside Drive is an "arterial and scenic drive" as described by Terence Priddle, an urban and regional planning consultant, who testified before the Tribunal on behalf of Berringer's.

In Mr. Priddle's evidence, he indicated that Riverside Drive West and the parklands developing on the north side were part of the tourist development of Windsor, providing views of the Detroit River and the Detroit skyline, and that tourists would be well served by Berringer's operations. He also indicated that Berringer's was on the periphery of the residential area to the south and that patrons coming by car would have no need to intrude into the residential area. Much concern was expressed by residents of the community that cars would park on these streets, but in fact the existence of parking in the parkland across the road from Berringer's would also be available. Although evidence presented indicated that this parking is presently closed in the winter, the City of Windsor in its zoning and planning capacity is certainly able to consider this aspect. Furthermore, it is the direct responsibility of the City of Windsor to deal with such parking issues.

Many of the concerns of the immediate residents related to the problems which had prevailed with the Coronation Tavern and quite rightly, they were concerned that such problems should not reoccur. But, in fact, Berringer's has been operating since January 5th of this year without an incident and in the view of Ron Thompson, an inspector for the Liquor Licence Board called by the objectors, the dance floor being quite small, the orientation is to dining. He also informed the Tribunal that while there were a number of

licensed establishments on University Avenue, a block to the south, on Riverside Drive West, there were no establishments between the Holiday Inn to the east and the Dominion Tavern, on the other side of the Ambassador Bridge, to the west some 15 to 17 blocks away from the Berringer's site. It was for this reason that Mr. Priddle had indicated to the Tribunal that there was a need for such an establishment to serve those people in the municipality utilizing the park system adjacent to the Detroit River.

One of the witnesses, Mr. Ziudema, referred to intensifying the use of Berringer's by allowing it to be licensed, but in considering the evidence of Mr. Thompson and that of Mrs. Smit, the wife of one of the owners of Berringer's, it would seem to this Tribunal that because of the emphasis on dining and the utilizing of the view of the river and of the Detroit skyline through the large windows facing Riverside Drive West, there would actually be an ameliorating of the previous tavern use.

In considering the wishes of the municipality, the Tribunal on previous occasions has stressed that the wishes of residents in the immediate vicinity are to be preferred to those more distant residents, and the Tribunal has taken that into account. It notes that while many of the local residents had originally signed a petition against the establishment of Berringer's, Mr. Marc Janisse had obtained a recent petition from a number of local residents after the restaurant was operating which indicated a contrary view. Many of the witnesses for the objectors testified that they had not been inside the restaurant, would not go inside and did not want any commercial operation located on that site at all. It is clear to the Tribunal that their experiences previously with the Coronation Tavern may have coloured their views. But in the view of this Tribunal, the wishes of the community as reflected by the contradictory petitions are not so sufficiently clear as to satisfy the onus of the objectors to this licence application.

Reference was made to the Elm Flameburger case decided by this Tribunal (1987) CRAT Summaries of Decisions, Volume 16, p.103. In the view of this Tribunal, there are significant differences between the facts of that case and this. In the Elm Flameburger case, an unlicensed restaurant had been operating in Toronto on Huron Street, a residential street for 25 years. In this case, a licensed tavern had been operating for an extended period of time, but it is located and in fact oriented to essentially a non-residential road: Riverside Drive

West. In the Elm Flameburger case, the restaurant was located between two private residences. In this case, Berringer's is at the corner of Curry Avenue. In the Elm Flameburger case, many problems of drunkenness, vandalism, rowdiness, noise and parking were cited, which the Tribunal noted were not caused by Elm Flameburger and which would not diminish if Elm Flameburger were not licensed. In this case, although such problems may have existed with the previous Coronation Tavern, there is no evidence before this Tribunal that such problems exist today or that they would arise by the granting of a Dining Lounge Licence to Berringer's. In the Elm Flameburger case, the lands in the area were owned by the University of Toronto, and while a good number of the residents had long-term leases, many of the problems may have emanated from the transient student population. In this case, the community is a relatively stable one without a substantial transient community, although there was some evidence that students from the University of Windsor might utilize the Berringer's premises.

In the Colourbar Restaurant case (1984) CRAT Summaries of Decisions, Volume 13, p.46, the Board issued a Proposal to refuse to issue a licence. After a hearing, the Board granted a Dining Lounge Licence. At the subsequent Tribunal hearing, it was noted that the restaurant had been operating for four months and there was no evidence of increased nuisance. Accordingly, the licence was issued. The facts in this case are similar.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the Decision of the Liquor Licence Board dated the 13th day of October, 1988, whereby it granted a Dining Lounge Licence, subject to the terms and conditions stated therein.

L.G. INVESTMENTS INC.
(INN ON THE BAY TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCES (TWO LOUNGES)

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
HELEN J. MORNINGSTAR, Member
DENNIS EGAN, Member

APPEARANCES:

A. LAWRENCE GAGNER, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 5 October 1989

Toronto

REASONS FOR DECISION AND ORDER

L.G. Investments Inc. is an Ontario corporation which owns the "Inn on the Bay Tavern", a premises on the shore of Milford Bay in the Muskoka Lakes Township. By Licence 092421, the premises have two lounges with capacities of 290 and 121 people. Mr. Larry Gagner, a barrister and solicitor, is the sole officer, director and shareholder of L.G. Investments Inc. The Inn operates from early May to early September and on the Thanksgiving week-end in each year. Through May and June, operations are on Thursday, Friday and Saturday evenings from 9:00 p.m. to 1:00 a.m.; with Tuesday and Wednesday evenings added through July and August. On the Saturday evening of a long week-end, the premises open at 8:00 p.m.

A Proposal was made on December 23rd, 1988, by the Liquor Licence Board to suspend the licence for these premises for fourteen days during the next summer seasonal operating period because of eight alleged infractions of the Liquor Licence Act or Regulations. These infractions were, in brief, as follows:

1. Failure to notify the Board as to changes in hours of operation.
2. Failure to maintain the hours as filed with the Board.

3. Permitting liquor to be removed from the premises.
4. Allowing more persons to be present than the licensed capacity.
5. Allowing persons less than nineteen years of age on the premises.
6. Selling liquor to an intoxicated person.
7. Permitting drunkenness or riotous, quarrelsome, violent or disorderly conduct.
8. Selling liquor after the hours allowed in the licence.

A hearing of this Proposal took place before the Liquor Licence Board on April 6th, 1989. In the decision, the first, second and third infractions were deemed minor and not to be punished by a suspension. The fourth and fifth infractions were not referred to, but the Board did find evidence to support the sixth and seventh infractions. As to the eighth infraction, the Board did not see the matter of a minute or two after closing hours to be worthy of a suspension. Considering eight years of operations and no prior charges, the Board ordered a suspension of three days. That decision is now appealed to this Tribunal.

Counsel for the Liquor Licence Board did not call any evidence concerning infractions one, two, three, four and five; but concentrated his case on the last three alleged infractions which are:

- (vi) contrary to section 43 of the Liquor Licence Act, the licence-holder sold or supplied liquor or permitted liquor to be sold or supplied to a person in or apparently in an intoxicated condition; or
- (vii) Further or in the alternative, contrary to subsection 8(4) of revised Regulation 581/80 under the Liquor Licence Act, the licence-holder permitted drunkenness or

riotous, quarrelsome, violent or disorderly conduct to take place in the licensed premises;

- (viii) contrary to subsection 9(1) of revised Regulation 581/80 under the Liquor Licence Act, liquor continued to be sold in the licensed premises after the hours allowed for sale and service of liquor.

Constable Paul Purdy of the Barrie detachment of the Ontario Provincial Police is a seventeen year veteran with knowledge of the area. He visited the Inn on Tuesday evening July 5th, 1988 at 10:00 p.m. There were some forty-five persons in the lounge, served by waitresses from three bars. He identified Kurt Poulsen as an intoxicated young man who was staggering about, fell down and knocked over some tables and then at 12:10 a.m. with the help of a young woman, went to a shooter bar and ordered four quick drinks of which he drank two.

Next, an "olympic" pie eating contest in which teams from various area resorts took part was held at 11:00 p.m. with a Master of Ceremonies who did speak coarsely and where some young people in high spirits did crowd around, stand on tables and with enthusiasm cheered on their various teams. Finally, at a minute or two after the closing hour, Constable Purdy asked to buy a beer, was refused at one bar but told to go to another, did so and bought a beer from a bartender. The beer was then taken to an outside police officer as an item of evidence.

Sgt. Larry Houston of the Ontario Provincial Police was the senior officer during the undercover visit of Constable Purdy. Sgt. Houston is a ten year veteran and well knows the location of the Inn. He confirmed the observed activities of Kurt Poulsen and described him as a very tall, thin young man whose Tee shirt bore the legend "Too Rad for Mom and Dad".

The Applicant brought forward as witnesses from that evening: Sander White, the manager on duty; Josie Savijarvi, a doorperson; Todd Hnytka, a team captain; and Duschan Ludvig, a bartender. Each of these stated that they knew the liquor rules, that the rooms were well filled with exuberant young people, that there was no fighting or rowdyism, that most arrived at 10:30 p.m., with the contest being held at 11:00 so any widely spread drunkenness was unlikely. There were admissions by both Ludvig and Larry Gagner that a drunken person could be served, that

mistakes can happen and that the purchase of a beer after closing hours could happen.

The Applicant, Mr. Gagner noted that there was no corroborative evidence for Mr. Poulsen's condition, that he was apparently not arrested by other police officers in the area and that no charges were laid. In his view, the possible drunkenness of one patron out of some 350 in attendance cannot be fairly singled out as a fault of the Licensee.

The "olympics" event did occur on this first Tuesday of the season where teams of young staff from various resorts in the area had a pie eating contest. The emcee's language was coarse and since the contest was located at one side of the room, several persons did stand on tables in order to see the proceedings but were told to get down. The event was thereafter moved to the centre of the room where more could see. The participants and audience are young persons, just off work who will return by bus or boat to their job locations after two hours of high spirited fun and social contact for the evening. There was no riotous, quarrelsome, violent or disorderly behaviour in the Applicant's view. Some bottles may have been dropped and broken, but they were promptly cleaned up. Plastic glasses are used to avoid any breakages.

While a beer may have been acquired a minute or two after 1:00 a.m., there is no staff bartender named Greg and there may just be a discrepancy in watches as the Liquor Licence Board was prepared to accept, said Mr. Gagner.

Mr. Gagner affirmed that the staff are given instructions as to the Liquor Licence Act and rules of service, that signs are prominently displayed concerning moving drinks to the washroom or consuming alcohol in the washroom area, that bartenders know their duties and that doorpersons have rules as to personal identification.

The Inn on the Bay is in a cottage area along a main road and close to a major public dock. It is a magnet for the young people who are staff at many area resorts and inns. With a location particularly attractive to youth, the management have an exceptionally high responsibility to ensure that the liquor service rules are completely followed.

The Tribunal accepts the evidence of Constable Purdy as to the three events which led to the particulars brought to the Tribunal by counsel for the Liquor Licence Board.

Accordingly, the Tribunal by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the Decision of the Liquor Licence Board and directs that the liquor licences for the two lounges of the premises operated as the Inn on the Bay Tavern be suspended for a period of three days, the suspension to commence at the opening hour on Thursday, June 14th, 1990 and to continue until the closing hour on Saturday, June 16th, 1990.

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Licensee. The appeal had not been concluded at the time of this publication.

LABATT'S BREWING COMPANY LIMITED

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

THAT Labatt's, its agents, representatives and employees shall not engage in any theme night promotional activity for a period of two months effective January 15th, 1989 until March 15th, 1989

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
ROBERT COWAN, Member

APPEARANCES:

DONALD BROWN, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 30 October 1989

Toronto

REASONS FOR DECISION AND ORDER

The Agreed Statement of Facts in this application which was filed as Exhibit 8 before the Tribunal is as follows:

1. Labatt's Ontario Brewery, a division of Labatt Brewing Company Limited, ("Labatt's"), is the holder of a manufacturer's licence under section 5 of the Liquor Licence Act, R.S.O., 1980 c. 244, as amended (the "Act") authorizing it to keep for sale, offer for sale, or sell beer to the Liquor Control Board of Ontario (the "LLBO"), or through government authorized stores. Labatt's operates breweries in Ontario at 50 Resources Road, Weston, 150 Simcoe Street, London; and 155 King Street, Waterloo; and maintains hospitality licences issued by the Liquor Licence Board of Ontario (the "LLBO") at these locations.
2. On June 9, 1988 Labatt's, with the authorization of the LLBO, sponsored the

Blue Light Grand Prix of Cycling Theme Night (the "Theme Night") which was run through portions of Front Street, Scott Street, Market Street and The Esplanade (the "route").

3. In connection with and as promotion for this event Labatt's distributed promotional packages to 23 licensees lining the route. The package contained the following:

- Race poster
- Win poster
- Entry Form/Coaster
- Pennant
- Cycling Cap
- Ballot Box
- Start/Finish Banner

4. In addition, each licensee received a Steve Bauer Official Grand Prix Bike to display and draw for on June 9, 1988. In all cases the draws were made by a Labatt representative at the site on the race day.
5. Labatt's submitted an application to the Advertising Department of the LLBO for the Theme Night in April of 1988. A copy of Labatt's application for approval, submitted in accordance with the Act and the policy of the LLBO, is contained in the Record of Proceedings at Tab 5.
6. The LLBO gave its approval to the proposed Theme Night subject to five conditions as set out in a letter of Gary Robitaille, Assistant Manager, Advertising and Promotion, which was dated May 12, 1988 and was picked up by Phil Harrington on behalf of Labatt's on May 23, 1988. A copy of this letter is contained in the Record of Proceedings at Tab 5.
7. The conditions imposed by the LLBO were:

- (a) All references to "Steve Bauer" were to be removed from the posters and coasters, as Steve Bauer is considered a role model for minors as stated in Section 3(c) of the Directive on Advertising.
- (b) the times, duration and location of each theme night location was to be submitted to the LLBO by May 20, 1988, 14 days prior to the event.
- (c) the ballot box and entry form/coasters were to be in licensed premises only during the date and time allocated for the Theme Night and when the Labatt's sales representative is conducting the Theme night.
- (d) no purchase of any product was required to participate.
- (e) the posters and bicycle were not to be displayed in windows facing the street viewed by the public.

8. Before Mr. Harrington was in possession of this letter he discussed certain of the conditions with Mr. Robitaille in a telephone conversation on or about May 17, 1988. This conversation resulted in the amendment to condition (a), discussed below in paragraphs 9 and 10.

9. Mr. Harrington was under the impression that Labatt's was given permission to utilize the name "Steve Bauer" in connection with the event as the name of the bike was the "Steve Bauer Official Grand Prix Bike". Mr. Robitaille was under the impression that the name would only be used on the bike and would be deleted from all other promotion material.

10. The failure of Labatt's to comply with Mr. Robitaille's modified condition was the result of misunderstanding and a

miscommunication and was not the result of an intentioned breach of the Act or of the policies of the LLBO. Counsel for the LLBO has indicated he does not intend to raise this issue at the appeal.

11. To improve its visibility as the promoter of the event, Labatt's provided 12 patio umbrellas to 12 licencees on the route on June 9, 1988. The umbrellas were strictly on loan and all 12 were picked up by Labatt's representatives on June 10, 1988. Such action was not a contravention of any section of the Act or its legislation. It had been alleged that Labatt's gave such umbrellas to the Muddy York Tavern but it was found at the original hearing before the LLBO that this was for promotional purposes only and it was picked up by Labatt's. Counsel for the LLBO has indicated that he does not intend to raise this issue at the appeal.
12. One of the licensees involved, the Paddington Pump Restaurant, displayed a poster for the Theme Night on its front door. The poster was observed on the door by Mr. Robitaille during his subsequent inspection of the Theme Night.
13. An investigation of the Theme Night was carried out by Mr. Robitaille.
14. As a result of Mr. Robitaille's inspection, a Notice of Proposal under the Act was issued on October 7, 1988 in which the LLBO alleged that Labatt's had breached conditions (a), (b), (c) and (e) of the approval and section 47(1) of the Regulations to the Liquor Licence Act. [The proposal was to deny "Theme Nights" to Labatt's for a period of four months.]
15. Labatt's requested a hearing of the LLBO regarding the Notice of Proposal pursuant to the provisions of the Act.
16. The hearing was conducted on December

8, 1988 and the decision of the LLBO was released on or about December 19, 1988. The LLBO found that Labatt's had breached only conditions (c) and (e) and had not breached the more serious charges of inducement and utilizing a role model who would appeal to children under age. Despite this the LLBO ordered that Labatt's cease conducting Theme Nights for a period of 2 months [from January 15th, 1989 to March 15th, 1989].

The decision of the Liquor Licence Board read as follows:

With respect to the other allegations, the Board is satisfied that there was a singular lack of any instruction or supervision on the part of Labatt's of its representatives and salespeople, and a similar lack of instruction or supervision by the representatives of its licensee customers. It is not enough for Labatt's to lay the blame at the door of its licensees for displaying posters improperly. Theme Nights such as this are initiated by the manufacturer to promote its product. While licensees stand to benefit from the Theme Night and the activities associated with the conduct of the Theme Night, there is as great or more benefit to the manufacturers otherwise why would they conduct Theme Nights at all. Just as there is joint and several benefit to the manufacturer and the licensee, there must be joint and several responsibility by the manufacturer and licensee to ensure that Theme Nights are conducted properly in accordance with the Board's directives and conditions.

Having heard all the evidence and submissions, the Board is satisfied that Labatt's did not meet its responsibilities: all it did was drop off the kits and other paraphernalia and leave it to the individual licensees to figure out what to do with it. The Board will not tolerate such cavalier attitudes and irresponsible

behaviour on the part of a manufacturer, its representatives and agents. The Board's approval was only given subject to certain conditions being met, not some of them, not some of the time, but all of them absolutely. Conditions 3 and 5 were not met, and could have been met had Labatt's taken the time to properly instruct its representatives and ensure that its representatives properly instructed and supervised the licensees.

This was not done, and accordingly the Board orders that Labatt's, its agents, representatives and employees shall not engage in any Theme Night promotional activity for a period of two (2) months effective January 15, 1989 until March 15, 1989.

Upon the issuance of the decision by the Liquor Licence Board, Labatt's requested a hearing before this Tribunal pursuant to Section 14(1) of the Liquor Licence Act. The hearing was set for April 26th and 27th, and adjourned on consent to July 24th and 25th, and again to October 30th.

Counsel for the Liquor Licence Board presented Glen Frederick Madeley who is the owner of Paddington's Pump, at 91 Front St. East in Toronto. This was one of the 23 locations along the route where Labatt's wanted patron involvement and publicity in order to add to the sales of Labatt's products before and during the event. Madeley would provide a V.I.P. section at the front terrace of the St. Lawrence Market and receive the promotional materials several weeks before the race, with ballots being put into the box from time to time by patrons in the 10 days prior to the race. A bicycle was delivered and displayed and various posters went up inside the premises.

A poster was apparently placed on the front door to which the inspector objected and there were no specific instructions about that or other matters given by the Labatt's representative. The event went along well and was enjoyed by the regular patrons. The one ballot box had ballots beside it, and a patron did not have to buy a Labatt's product to enter or even be present at the draw to win.

Sean Michael Roach is the General Manager of another pub along the route which is the "Down Under". Again a ballot box was

there some days before the event and some ballots were deposited early although most went into the box on the day of the race. The Labatt's representative drew the winner's ballot on the evening of the race. Displays were put up when they arrived several weeks before the event. Again the event went very well and some sales increase of Labatt's products occurred, but mainly just on the day of the event.

Kathy Klas is the manager of the Advertising and Promotion Department of the Liquor Licence Board and presented a two page "Theme Night Guidelines" document which was prepared in July 1985; and has not been amended since. The document reads as follows:

THEME NIGHT GUIDELINES

The Board has been approached by several alcohol beverage producers for consideration of proposals to permit sponsorship of promotions, contest of theme nights within licenced premises.

After lengthy consideration, the Board approved such promotions as we are of the opinion that the opening of this area of promotion would reduce the possibility of illegal inducement activity involving alcohol beverage producers and licencees. Further, a set of guidelines have been developed to provide guidance relative to the provisions of Section 47, subsection (5). These will be placed in the Board's Directives on Advertising and Sales Promotion in the near future.

Should your Company wish to develop a licensee promotional programme, the following points should be considered as guidelines for your submission to the Board.

BASIC CONCEPT

Your Company would be permitted to loan the licensee Board approved corporate or branded promotional material for the period of the promotion only i.e. day or evening. The event will be organized by the licensee with assistance from members of your sales staff.

ADVERTISING

The licensee could display a Board approved poster, supplied by your Company, within the licenced premises for a period of two weeks prior to the event. No off premises advertising will be permitted.

DECORATIONS

Your Company may supply licencees with various corporate or brand identified decorations/promotional material such as balloons, place mats, coasters, tent cards, banners, posters, serviettes, product display units, etc. These will be removed from the premises at the end of the promotional event.

FOOD SERVICE

Your Company may supply licencees with corporate or branded items such as tent cards or posters which could be utilized to advertise food specials during the period of such events.

STAFF APPAREL

You may provide licensee staff with corporate or branded apparel for the period of the event only. Examples of such apparel would be shirts, hats, aprons, ties, etc.

CONTEST/DRAWS

Contests may be conducted during the period of the event for corporate or brand identified items supplied by your Company. These items would be sold to the licensee at cost. Further, draw tickets could be sold to patrons during the period of the promotion for corporate or branded items providing the total proceeds of the draw were donated to a charity of the owners choice.

FREQUENCY

Your Company will be limited to five promotional events per licensee per calendar year.

MISCELLANEOUS

Your registered representatives may "sample" patrons in attendance at each event. Sampling will be restricted to one serving per person per event. There will be non-financial support of product consumption, outside the bonafide product sampling. There shall be no exclusivity of any Company's products.

Licencees to be informed that no purchase of any alcoholic beverages is necessary to participate in the activity, no reduction in selling price of alcoholic beverages and all product sold to be purchased under the authority of the licenced establishment licence number.

Since the foregoing is a new promotional area, it is suggested that additional points may arise which will require further discussion. If this occurs, please call at your convenience.

Yours very truly,

G.J. Conroy
Manager, Advertising
& Special Projects

Ms. Klas acknowledged that a group of locations had not been expected so the requirement for a representative to be present throughout the evening would be impractical for 23 locations, but several representatives perhaps could do the draw for a winner in a location and move on over the evening to the other locations. In any case, the manufacturer is the responsible party. Full-time employees are required, so the hiring of extra persons even to stay in a location for the whole evening would not have been satisfactory. Advertising is done within the premises so as to influence regular patrons in their choice of beverage and not to induce the public generally to enter the premises.

Theme nights are initiated by the full-time sales representatives of the brewers, distillers and vintners in Ontario in order to have by a contest, draw or event, some raising of the profile for a producer for the regular patrons of an establishment

on that day and to have some degree during the two weeks prior to an event to influence sales of product. It is apparent that while sales may increase in one location or another for a particular product on a day or even for a week or two, the impact on total sales for a year of a producer's products is minimal as the patterns of consumption revert to their normal percentages after the event. So these representatives are busy covering locations for special events to raise the profile of their own products, but in reality they are all running very hard just to stand still.

Sales promotion rules were reviewed in a letter by Ms. Klas to seventeen manufacturers sent on September 17th, 1987 and a further informational letter went out on January 8th, 1988. In addition, the "Directives on Advertising and Sales Promotion for Beer, Wine and Cider Industries" were placed before the Tribunal. These Directives were issued in October 1980 and do not include any material on Theme Nights which are a relatively recent development.

A memo on outdoor advertising policies of the Liquor Licence Board was distributed on January 21st, 1988 and all 16,000 licensees in Ontario were sent a Newsletter in October 1988 which outlined the general rules for "Theme Night" events. Ms. Klas acknowledged that none of the 23 participants in this bicycle race event had been charged with any offense or been reprimanded in any way.

Ernest John Heinemann, C.G.A., is the Director of Finance at Labatt's and a sixteen year employee who stated that Theme Nights have a value in building a higher common consumer focus in the establishments, allowing the sales representatives by "sampling" to champion his own products and introduce new items. Labatt's have 64 full-time sales representatives to service the 16,000 licensees in Ontario and each tries to conduct two Theme Nights each week. Of course, their time is disproportionately spent in visiting those high volume locations where younger, active patrons could by changing brands have some impact on the total sales picture.

He stated that a two month loss of the right to have a Theme Night would mean that the five possible events per licensee per year could not practically be crammed into the remaining ten months of the year. He valued a one-quarter market percentage point for two months at \$270,000 in lost profit and claimed that to build back that loss over the rest of the year would see a further \$1,485,000 in accumulated lesser profits on lost sales.

While other competing sales forces would be active in the market among major volume licensees for the two months in question,

he acknowledged that providing samples, using posters and point of sale items, having beer taps and other general advertising and further promotions would all allow the Labatt's representatives to remain otherwise very busy. And further, the 75% of products which are consumed in the home would have their volume interfered with only to some degree by a cancellation of the opportunity for some Theme Nights in some locations over a two month term. The industry volume upon which the financial calculations were based also includes the sale of American and other imported beers which would, therefore, likely make the impact of some lesser importance to Labatt's total market share.

In argument, counsel for Labatt's sought to have the Tribunal declare as **ultra vires**, paragraph 47(5) of Ontario Regulation 581 which is as follows:

- 47(5) No holder of a manufacturer's licence shall publish or permit to be published any advertisement or engage in any promotional activity intended to attract public attention to its corporate name or the brand name of its products without prior approval of the Board.

In his view, that portion of the Regulation goes beyond Section 50(1) of the Liquor Licence Act which states:

- 50(1) No person shall advertise liquor or display public notice that liquor is available for sale except in accordance with the regulation,

since under section 39(1) of the Act, the Lieutenant Governor in Council can make regulations,

- (1) controlling the advertising of liquor or its availability for sale and requiring that the form of advertisement or public notice be subject to the approval of the Board;

In his opinion, only such particular matters could be done by any regulation of the Board.

In reply, counsel for the Board noted that the business operations are not being suspended and that only a term and condition is in effect being added to the Labatt's licence which

is a power of the Board under Section 9(1) of the Liquor Licence Act.

Counsel for the Board referred to a recent decision of October 7th, 1987, wherein Labatt's also had a proposal of a two month suspension of promotional activity due to the display of a giant inflatable beer can and a large inflatable dog used at a Kingston Park.

He noted that no opposition was expressed by Labatt's at that time as to the powers of the Board to enforce part 47(5) of Regulation 581.

The Tribunal accepts the submission of counsel for the Board and rejects the suggestion that Regulation 581, paragraph 47(5) is **ultra vires** of the power of the Liquor Licence Board.

After reviewing the evidence before us and considering the principles cited in the decision of the Liquor Licence Board quoted above, this Tribunal agrees with that decision and this Tribunal by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the decision of the Liquor Licence Board and orders that Labatt's, its agents, representatives and employees shall not engage in any Theme Night promotional activity for a period of two (2) months, effective January 15th, 1990 until March 15th, 1990.

LAKESHORE PUBS LIMITED
(KELLY'S KEG'N JESTER TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCES AND
TO REFUSE TO RENEW THE LICENCES

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
GORDON R. DRYDEN, Member
ROBERT COWAN, Member

APPEARANCES:

EDWARD A. JUPP, acting as "Officer of the
Corporation"

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 29 May 1989

Toronto

REASONS FOR DECISION AND ORDER

On March 3rd, 1989, the Liquor Licence Board of Ontario proposed to revoke and refuse to renew a dining lounge licence number 090815 for a restaurant known as Kelly's Keg'n Jester Tavern, which is located in area A-22 at Ontario Place in Toronto. The licences expire on May 31st, 1989. The Proposal noted that "the premises where the licence-holder carries on business is leased from Ontario Place Corporation and the lease expired on October 31st, 1988, and has not been renewed."

Since the Licensee was not in operation during specific hours, and did not have the licence posted in a conspicuous place in the premises and was not serving meals pursuant to the requirements of Subsections 8(28), 8(43) and 11(2) respectively of the Regulations, the Liquor Licence Board proposed to revoke or to refuse to renew the licences in question pursuant to Section 10(3) of the Liquor Licence Act. In the alternative, the Board proposed to suspend the licences until the Licence Holder has regained possession of the premises.

A hearing before the Liquor Licence Board was requested and took place on April 13th, 1989. At that time, there was filed the Concession Agreement made March 2nd, 1971, between Her Majesty the Queen in Right of Ontario as represented by the Minister of

Trade and Development, and Lakeshore Pubs Limited. There was also filed an Amending Agreement made January 18th, 1988; (incorrectly cited as 1989 in the Decision).

As the decision of April 21st, 1989 noted, Lakeshore Pubs Limited had held this concession for Area A-22 at Ontario Place, Toronto for 10 years from 1971 to 1981; then for two further three-year terms and two further one-year terms.

The Amending Agreement of January 18th, 1988 confirms that the expiry of the lease to the aforesaid premises occurs on October 31st, 1988.

In the Decision dated April 21st, 1989, the Liquor Licence Board found that "liquor licensing has a dual aspect requiring both a qualified person and premises to which the holder has access, of which it has its obligations under the Liquor Licence Act. The uncontroverted evidence was that the Concession Agreement did expire on October 31st, 1988 and has not been renewed. Until the law suit has been determined, Lakeshore Pubs Limited has no access to or control of the premises, and cannot meet its obligations under the Liquor Licence Act."

The Liquor Licence Board revoked the licences and refused to renew the licences. An application for a Stay of the Board's Order was made to this Tribunal on April 27th and was heard on May 12th. In an oral decision, the Tribunal denied the application.

The Tribunal referred to the expiration of the lease on October 31st, 1988, and also to the fact that a new lease had been entered into by Ontario Place Corporation with another party to conduct a restaurant in the premises known as A-22 (incorrectly cited as 822) at Ontario Place, Toronto.

The Tribunal continued at page 2 as follows:

...this Tribunal recognizes that a licence can only be granted for physical premises that are owned by an applicant or held under a lease. Until such time as the Supreme Court of Ontario makes a determination that Lakeshore Pubs Limited holds a lease, this Tribunal must go upon the facts that were before it and before the Liquor Licence Board, namely that Lakeshore Pubs Limited does not hold a valid lease to premises at Ontario Place.

On May 29th, 1989, the Tribunal heard an appeal from the decision of April 21st made by the Liquor Licence Board. Mr. Edward A. Jupp, Q.C., appeared as an Officer/Director and one-fifth owner of Lakeshore Pubs Limited; and he had also appeared at the hearing before the Liquor Licence Board and at the hearing for a Stay before this Tribunal.

Mr. Joel Shapiro is the Director of Financial Administration and Secretary-Treasurer of Ontario Place Corporation. He has had those duties for the past sixteen months.

Mr. Shapiro stated that Lakeshore Pubs Limited do not have a current lease to the former premises known as A-22 at Ontario Place. A lease has been granted to a new operator and a restaurant known as Jam'Z Bistro and Bar is operating in the completely renovated location as from May 18th, 1989, on which date the current 110-day season began. Liquor licences as required have been obtained for the new restaurant. All furnishings and other items owned by Lakeshore Pubs Limited were removed and a vacant area was taken over by the new operator, who accomplished the setting up of the new restaurant at a cost of more than \$700,000.

Mr. Shapiro reviewed the pattern of discussions and the proposal called for upgraded dining facilities at Ontario Place where some 36 parties, including Lakeshore Pubs Limited, were invited to apply. The report of Laventhol and Horvath was reviewed where an "objective third party assessment of each proposal" by Lakeshore Pubs Limited and by Winston's Catering Services Limited for Area A-22 was made, and the accommodation favoured the Winston application.

The Food Services Subcommittee and then the Board of Directors of Ontario Place agreed; and on December 21st, 1988, a letter was sent to Mr. Jupp by Mr. Ed Cieszowski, the General Manager of Ontario Place Corporation, which announced the award of the lease of Area A-22 "to another organization".

Mr. Edward A. Jupp, Q.C. set out a chronology of the events which led up to today's hearing and he filed a copy of the Notice delivered to Premier David Peterson, to Hon. Hugh P. O'Neil, and to the Officers, Directors and the General Manager of Ontario Place Corporation. He also filed a copy of the Statement of Claim #34317/89 in the Supreme Court of Ontario which is an action by Lakeshore Pubs Limited against Ontario Place Corporation and Ed Cieszowski for certain declarations, damages and injunctions. This Statement of Claim is dated January 5th, 1989.

Mr. Jupp also filed with the Tribunal a copy of the Concession Agreement of March 2nd, 1971, and of the Amending Agreement of January 18th, 1988; both of which were presented earlier to the Liquor Licence Board at the hearing of April 13th, 1989.

Mr. Jupp acknowledged the expiry of the lease on October 31st, 1988, but maintained that a right of access had been preserved by the negotiations, sketches, meetings and discussions with various officers at Ontario Place Corporation.

The Tribunal has carefully considered the original Proposal, the Decision of the Liquor Licence Board and the reasons given in the Tribunal's decision to refuse a Stay of the Board's Order of revocation of the licences of Lakeshore Pubs Limited.

The Tribunal finds that the lease referred to earlier did expire on October 31st, 1988, with no right of renewal and that Lakeshore Pubs Limited is not occupying the premises, but that another operator has a lease and liquor licences, and is in operation for the season which commenced on May 18th, 1989, after having done entire renovation to the empty area known as A-22 in Ontario Place.

The Tribunal confirms the reasons of the decision made at the hearing for a Stay on May 12th. We find that Lakeshore Pubs Limited does not hold a valid lease to premises at Ontario Place. Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the revocation of the licences held by Lakeshore Pubs Limited and the refusal to renew those said licences by the Liquor Licence Board of Ontario is confirmed.

LANDING STRIP INC.
(LANDING STRIP RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCE

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
HELEN J. MORNINGSTAR, Member
ROBERT COWAN, Member

APPEARANCES:

JOEL GOLDENBERG, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 26 June 1989

Toronto

REASONS FOR DECISION AND ORDER

The facts in respect to this matter are not substantially in dispute although Mr. Holubko, the investigator for the Liquor Licence Board, in his evidence brought the Tribunal up to date with respect to the operation of the Landing Strip Restaurant. These facts are set out in the decision of the Liquor Licence Board rendered February 27, 1989. It appears that the business of the restaurant was acquired in August 1986 by the Landing Strip Inc., the principals of whom were Mr. Ben Grossman and Mr. Milan Pataran. Extensive renovations were made, and the establishment did not commence operations until December 1986, according to the evidence given by Mr. Holubko to the Tribunal. It was also acknowledged that Mr. Pataran conducted the actual day-to-day running and management of the restaurant and was responsible for establishing the procedures to be followed in making reports to the Liquor Licence Board. In April 1987, Mr. Grossman bought out Mr. Pataran and while new managers were hired to conduct the day-to-day running of the restaurant, the procedures established by Mr. Pataran for reporting were continued throughout this time.

Mr. Holubko indicated to the Tribunal that pursuant to an anonymous telephone call reporting purchases of liquor improperly, he attended at the premises June 8, 1988. His observations indicated that there were no improper purchases, but being present he decided to check the records of the restaurant. Mr. Holubko indicated that Mr. Grossman co-operated in his investigation and provided him with the records of the restaurant. Mr. Holubko in checking these records ascertained that they did not coincide with

the reports which had been previously been filed with the Board. Mr. Holubko informed the Tribunal that when he drew this to Mr. Grossman's attention, Mr. Grossman indicated that he was extremely embarrassed by these errors of which he was unaware. Under Mr. Holubko's recommendation that Mr. Grossman hire new external auditors, Mr. Grossman apparently did so promptly and initiated new procedures, installed new cash registers, and established more accurate reporting policies.

Mr. Holubko in his evidence indicated that Mr. Grossman was fully co-operative with the Board's investigator. He further informed the Tribunal that the new procedures which have been implemented have fully satisfied the Board. Mr. Holubko indicated that there are absolutely no complaints with the licensee at the present time. The operation is being conducted in a satisfactory manner.

In response to questions from the Tribunal, Mr. Holubko indicated that there has been in some areas of the industry a misconception as to how to account for taxes on liquor purchases and that the system was followed in which a 25% deduction from gross liquor sales was made before calculating the food to liquor ratio. Mr. Holubko indicated in his testimony to the Tribunal that he believed that Pataran was utilizing this procedure to some large extent when making his reports to the Liquor Licence Board. While this procedure is clearly improper, and, in fact, has been discontinued in the case of the Landing Strip Restaurant, no evidence was presented to the Tribunal that Pataran in making his reports either followed this practice or did not so. Furthermore, there was no evidence put forward that if Mr. Pataran was following this practice that such constituted an attempt to file false reports with the Board contrary to Section 55(1) of the Liquor Licence Act.

In the original Proposal to revoke, the Board relied upon the provisions of Section 55.1(a) of the Liquor Licence Act in that the licence holder knowingly furnished false information. Section 55 reads as follows:

- (1) Every person who:
 - (a) knowingly furnishes false information...
in any statement or return required to be
furnished under this act or the regulations
...and every director or officer of a
corporation who knowingly concurs in such
furnishing...is guilty of an offence...

Evidence was presented to the Tribunal that no person was ever charged with respect to violations of the Liquor Licence Act in regard to the Landing Strip Restaurant. The Board, therefore, in making its decision would have to rely on the past conduct of the officers or directors or shareholders of the restaurant under the provisions of paragraph 6(1)(c) of the Act. It was pointed out by both counsel that the Tribunal had the advantage of hearing Mr. Holubko's testimony while the Board had only had Mr. Holubko's report and the Board did not have the advantage of hearing the evidence which Mr. Holubko provided to the Tribunal as to events at the time of the hearing by the Board and at the current time. If the Board had been given such opportunity, it is the respectful view of this Tribunal that the Board would not have rendered the decision it did.

The evidence before the Tribunal now, therefore, indicates that there was no evidence that Pataran knowingly furnishing false information to the Board, in fact, the evidence seems to indicate that the Landing Strip Restaurant had been following a practice followed by other licensees, as well that is now known to be improper. Given that evidence presented to the Tribunal, there has been no evidence presented that Mr. Grossman has done anything improper with respect to the operation of the restaurant. In fact, the conduct of Mr. Grossman according to Mr. Holubko's evidence has been quite to the contrary. Immediately upon his being apprised of improper procedures, Mr. Grossman changed such procedures and instituted good practices which are now in place and which Mr. Holubko informed the Tribunal are quite satisfactory to the Board in regard to the operations of the restaurant at the present time. On the basis of the evidence presented, it is the view of this Tribunal that the past conduct of Mr. Grossman, an officer and director of the licence holder, the Landing Strip Inc., does not afford reasonable grounds for belief that business of the licensee will not be carried on in accordance with law and with integrity and honesty. Therefore, on the basis there is no reason to impose a suspension or reporting requirement.

Accordingly by virtue of the authority vested in and under Section 14(3) of the Liquor Licence Act, the Tribunal hereby revokes the decision of the Liquor Licence Board dated the 27th day of February, 1989.

REYNOLD GEORGE NICELY
(NICELY'S CARRIBBEAN RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A LIQUOR LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

REYNOLD GEORGE NICELY, appearing on his own behalf

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF
HEARING: 22 February 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Reynold George Nicely, proprietor of Nicely's Carribbean Restaurant in Scarborough from the decision of the Liquor Licence Board refusing to issue a liquor licence for the subject restaurant.

It is relevant to note that the decision of the Board was made only after the most thorough investigation of the circumstances of the the application and the presentation of evidence by both the liquor inspector and the Metropolitan Toronto Police. The Board also reviewed the evidence of a previous hearing arising from the issuance of two Special Occasion Permits in which the Board had refused to issue any further permits for special occasions. That decision was made on May 9th, 1988, prior to which Mr. Nicely had filed his application to licence his restaurant.

At a hearing on this application held by the Board on July 7th, 1988, counsel for both the Applicant and the Liquor Licence Board were to tender written submissions which were received on September 26th, 1988, and the decision of the Board was rendered on October 31st, 1988.

The Proposal to refuse to issue the licence was based on two grounds:

- (1) that the past conduct of the Applicant Reynold George Nicely affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;
- (2) the Applicant is carrying on activities that are or will be if the licence is approved be in contravention of the regulations.

Since the Board based its decision on the first ground, it found it unnecessary to deal with the second and concluded: "Given the nature of the misconduct and of the relative recent date of the occurrences, the Board finds that the past conduct of the applicant affords reasonable grounds to believe that he will not carry on business in accordance with law and with integrity and honesty".

It is this decision from which the Applicant now appeals.

The Facts

Nicely's Carribbean Restaurant located at 3150 Eglinton Avenue East, Unit 1, in Scarborough is operated by one Reynold George Nicely under a lease which terminates on December 31st, 1990. The rent for the year 1989 is \$2,250.00 per month which Mr. Nicely indicated in evidence was some two or three months in arrears. Although he has done some renovation, it still does not meet the requirements of the Liquor Licence Board for a licensed premises. That, however, is not a consideration in this appeal.

Nicely had rented the premises out on two occasions. January 16th and 17th, 1988, and on February 5th, 1988 for parties to one S. Jones and one Errol Blackburn respectively.

Both Jones and Blackburn applied for and received Special Occasion Permits for their parties which became the subject of a police investigation and resulted in several charges being laid in consequence offences committed against the Liquor Licence Act, and the Board in its decision of May 9th, 1988, refused to issue any more permits for special occasions. Prior to these events, Mr. Nicely had made application to the Board for a permit to licence his premises on January 7th, 1988.

The Evidence

It would serve no useful purpose to deal at length with the evidence concerning the infractions alleged to have occurred on January 16th and February 5th, 1988, when Nicely had rented the premises for private parties. On January 16th, the police received information of a man with a gun on the premises although Constable David Ashby of the Metropolitan Toronto Police testified no gun was ever found. He said he entered the restaurant at about 3:45 a.m. and found some 200 to 250 people milling around. Some beer bottles were thrown and mixed drinks were visible. There was a male and female behind the bar, the latter one being Claudette Smith whom Nicely had left in charge since she was his employee. Nicely arrived at the scene about 4:00 a.m. The Constable noted from 200 to 300 empty beer bottles, although the Special Occasion Permit made allowance for only seven cases and set the hours from 7:00 p.m. to 1:00 a.m. for 70 people. It appears the event had been advertised through a handbill which described it as a "Nicely Production" and admission was set at \$7.00. The officer did not lay any charges since he was not familiar with the Regulations and turned the matter over to another department.

On February 7th, 1988, a similar event took place when one Errol Blackburn was issued a Special Occasion Permit and advertised his private party. The advertisement made no reference to Nicely, simply to the address of the restaurant and called for a \$15.00 admission charge.

Constable MacLean of the Metropolitan Toronto Police Force testified that several officers had taken up a surveillance of the property at about 9:30 p.m. across the street, and she attended at the restaurant at about 1:55 a.m. in plainclothes accompanied by one P.C. Thomas also in plainclothes. They were asked for the cover charge of \$6.00 which was paid by Thomas and then paid \$4.50 each for two bottles of beer. There was apparently a lineup to the bar and 70 or so persons in the establishment at that time. When they went to order more beer, they were told the supply had run out but more was expected shortly.

Constable Mann who had taken up surveillance at 9:30 p.m. with a Constable Ross executed a search warrant at 2:45 a.m. and found approximately 100 persons on the premises drinking beer and drinks from styrofoam cups. Two disk jockeys were providing loud music. Mr. Nicely's manager, one Claudette Smith, was cooking in the kitchen where a quantity of beer was seized by an officer. A vehicle belonging to Errol Blackburn

was parked at the back door containing ten cases of beer which were being transferred to the premises. The officers seized 172 bottles of beer and \$512.00 from the doorman.

While the officers were there, Mr. Nicely appeared with his daughter. From all the evidence, it appears the police considered Nicely's Restaurant an illegal nightclub and what they termed as a "booze can". Mr. Nicely was subsequently charged and fined \$500.00, but said he was appealing this conviction. Charges were laid and convictions registered against several other members of the operation.

The evidence of Mr. Nicely conflicts in virtually every detail with that of the police officers. He denies the sale of any liquor except that permitted by the Permit; he refuses to admit any knowledge of any infractions of the Liquor Licence Act and denies that he had any control over the two events. We find, as a fact, however, that Mr. Nicely knew of the clandestine operation of the restaurant as a "booze can" or illegal nightclub and, although not personally present during the whole of the two evenings and mornings at least held some control and knowledge through the employment of his Manager, Claudette Smith who was present on both occasions.

Mr. Nicely testified that the restaurant simply did not pay without a liquor licence and that was why his rent was in arrears. It follows that an illegal operation would tend to supplement the business income until a liquor licence was granted.

The Law

We accept the evidence of the police officers that the infractions alleged by them did, in fact, occur. Since, however, they took place on two occasions when Nicely had rented the premises to friends for ostensibly private parties and Special Occasion Permits were issued to those friends, can we find Nicely is a party to those offences? He was aware of the type of operation his friends were conducting on his premises. He had knowledge of the advertising, one of the events being advertised under his name. He was on the premises at some times during the incidents and he had left his own employee/manager in charge. There is no question, therefore, that we cannot impute full knowledge and even sanction to him. Is this then relevant to his own application for a liquor licence?

This case is almost on all fours with the Sterio's Restaurants Limited vs. The Liquor Board et al (1980) Liquor Licence Appeal Tribunal Summaries of Decisions, Volume 3, page 110, in which precisely the same issue was addressed. Briefly in that case, the Applicant Sterio's Restaurants Limited appealed to the Divisional Court from a decision of the Liquor Licence Appeal Tribunal refusing future Special Occasion Permits to be issued for parties wishing to use the premises. The reasons (released: November 25th, 1980) are stated by Mr. Justice Holland who wrote the judgment for the Court:

The Board here was considering a course of conduct by a licence holder who continued to rent out these premises to clubs and organizations notwithstanding the knowledge held by the licence holder that breaches of the Liquor Licence Act and regulations were being committed and permitted by these special occasion-sale permits holders.

The Liquor Licence Appeal Tribunal in its decision said at page 20:

The Tribunal is of the opinion that a licensee has a responsibility in respect of the licenced premises for compliance with the Act and regulations which is not abrogated by result of a special occasion permit in respect thereof to another person.

and at page 21:

The dining lounge licence does not go into a state of suspension in respect of the portion to be utilized for a special occasion permit for the duration thereof. The licence continues and so does the responsibility of the licensee thereunder. To hold otherwise would be to admit a licensee who has all the advantages of a dining lounge with reduced responsibility.

I agree with this interpretation of the continued responsibility of the licence holder, notwithstanding that a special occasion permit had been issued. The Liquor Licence Appeal Tribunal's interpretation of the responsibility of the licence holder in these circumstances, in my view, is correct.

...There is in the special circumstances here, concurrent responsibility on both the licence holder and the permit holder. Appreciation of this responsibility by the licence holder will no doubt require a licence holder to exercise care in the rental of the licensed portion of its premises.

The present case differs from the Sterio's case only in that the Sterio's Restaurant case was that of a licence holder, whereas Mr. Nicely's application for a licence was being considered by the Board, but had not been granted. But we find here, the same concurrent responsibility on both Mr. Nicely and the holders of the special permits because of his obvious knowledge of the offences being committed on his premises with his tacit consent and the fact that he still retained some measure of control over the premises in the person of his manager Claudette Smith. We cannot think that had Mr. Nicely's licence been granted at the time of these offences, his conduct would have been any different.

It is conceded that under Section 37(10) and (11) of Regulation 581 of the Liquor Licence Act, liability attaches solely to the permit holder as a result of his licence. The relevant sections are as follows:

- (10) The holder of a special occasion permit shall ensure that the number of persons attending the event does not exceed the capacity stated on the permit.
- (11) The holder of a special occasion permit shall provide adequate security to ensure unauthorized persons do not attend the event and that the terms and conditions of the permit and the provisions of the Act and this Regulation are observed.

The appropriate penalties are provided for in the Act and assessed against the holder of the permit, not the tenant or owner of the premises. But where, as a result of his knowledge of the infractions being committed on his premises and no attempt is made to curb them, we must view the conduct of the tenant as practically accessory to the offence, the implication being that his own licence would be treated in the same cavalier fashion, with no regard for the law.

Pursuant to Section 6(1)(d) of the Liquor Licence Act, which provides:

An applicant for a licence, or for approval of the transfer of a licence, other than a licence referred to in section 5, is entitled to be issued the licence or have the transfer approved, except where...

(d) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with integrity and honesty,

we are bound to take into consideration the past conduct of the Applicant in these circumstances.

It is our opinion that the decision of the Liquor Licence Board be sustained, but point out to the Applicant he is not being penalized for the wrongs committed by others, but by his own sanction of and permissive attitude towards those wrongs.

For these reasons, we are of the view that the finding of the Liquor Licence Board was correct and by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act hereby direct the Board to carry out its Proposal.

OLIVER'S ROADHOUSE RESTAURANT LTD.
(OLIVER'S ROADHOUSE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LIQUOR LICENCE

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
DENNIS J. EGAN, Member

APPEARANCES:

JOHN W. CLARKE, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 29 November 1989

Alliston

REASONS FOR DECISION AND ORDER

Oliver's Roadhouse Restaurant at 59 Victoria Street, Alliston has a 219-person dining lounge licence 201618 granted to Oliver's Roadhouse Restaurant Ltd; which corporation is owned in equal shares by Pietro Mantione and Sebastian Sanginesi. On January 27th, 1989, the Liquor Licence Board of Ontario proposed to suspend this licence for 28 days because of various events which occurred in the early morning of Sunday, October 30th, 1988. As a result of a report from police officers attending to investigate complaints of a fight, the Liquor Licence Board saw various breaches of its regulations in the allowing of persons under the age of nineteen to be on the premises and in supplying liquor to them, without obtaining proper personal identification and without refusing service to persons apparently already intoxicated, and further in allowing drunkenness and riotous conduct to take place in the licensed premises.

At a hearing before the Liquor Licence Board, the term of suspension was reduced to fourteen days to be in effect from August 7th to 20th, 1989, and that decision is now appealed to this Tribunal, with a stay in the suspension agreed to on consent until the decision from this Tribunal is announced.

The decision of the Liquor Licence Board reads in part:

Police Constable William Couldridge of the Alliston Police Force testified that he received a radio call at 1:35 a.m. on October 30, 1988 to attend Oliver's Roadhouse Restaurant concerning a disturbance, namely a fight, inside the premises. On their arrival they determined that the fight had occurred inside the bar but was over, and the people involved had left the premises. He further testified that, while they were there to investigate the call regarding the fight, another fight was taking place on the sidewalk in front of the main door of the premises. The premises were very crowded at that time with patrons wandering around, carrying open bottles of beer. People in obvious states of intoxication were everywhere, and there did not appear to be anyone in control on the premises at the time.

On the evening of October 30, 1988, two (2) patrons under the age of nineteen (19) years were on the premises consuming beverage alcohol, one of whom seemed very intoxicated. In January 1989 a bartender, who is no longer employed on the premises, entered a plea of guilty in Provincial Offences Court on the basis of failing to obtain evidence of age contrary to Subsection 8(6) of Revised Regulation 581/80 of the Liquor Licence Act, and was fined \$100.00.

The Board acknowledges the fact that this is the first time the Licensees have been before the Board; however, it must be stressed that service to minors is a very serious infraction of the Liquor Licence Act, and these Licensees and other Licensees in the

area must be made aware of this fact. The Board also takes into consideration the fact that this was Halloween night.

Counsel for the Board called as the first witness, Police Constable William Couldridge, a thirteen year veteran who for three years has been on the Alliston Police Department and who repeated the evidence outlined above.

His police car was joined at the scene by a second driven by Sergeant Henry de Wolde. The disturbance on the sidewalk led to the arrest of Guy Grantmyer, and Peter Marshall and some other persons were moving from Oliver's to the sidewalk and back with open bottles of beer in hand. Some 40 persons were outside and some 70 persons were inside Oliver's, with no apparent staff control over the boisterous Halloween crowd.

Witnesses to the two-punch fight in which John Zaya was charged with the assault of Jason Fellowes were invited to come to the nearby police station to make their statements. Shawn Lang appeared at the police station and this young man, born on January 29th, 1970 was three months under the age of nineteen. According to P.C. Couldridge, Lang was very drunk, staggered and even fell off the chair during his interview. He had come to try to give a statement in support of his friend, Jason Fellowes, with whom he, Melissa Falardeau and two others were partying that evening.

Melissa Falardeau was also interviewed and gave her birth date as January 31st, 1971, so that she was 17 years and nine months of age. She lived with Jason Fellowes and had been fired from her job at a grocery store by the owner John Zaya. Apparently some remarks between Zaya and Fellowes at Oliver's led to the sudden blows. Both Lang and Falardeau admitted to P.C. Couldridge that they were drinking at Oliver's that evening.

At the time of this event, the manager of Oliver's was Steve McLeod who was informed that information concerning the events that evening would go to the Liquor Licence Board and, as set out in the quotation above, a guilty plea was entered by him, not by a bartender, to a charge of failure to obtain evidence of age.

Sergeant Henry de Wolde is a 22-year veteran who knows Oliver's well as a popular location for the younger crowd in town and knows many of the patrons who he sees there on his routine monthly visits. He said that Guy Grantmyer had been barred from

the Windsor Hotel, Alliston's other premises across the street. There were no other charges laid and the patrons inside Oliver's were boisterous and beyond the level of a "good time", while staff were not in control.

Shawn Robert Lang admitted being in Oliver's that evening, being underage and in the company of Melissa Falardeau, who was also underage, and drinking at Oliver's without being asked for any identification. He said that he was drunk, didn't know how the fight began and may or may not have actually bought bottled beer at the bar for his table.

Lang said that he would not be served at the Windsor or at Rigobigo, but drank at Oliver's on occasion and was known to the staff. He did not recall paying a cover charge on entering or waiting in line to have any identity checked.

Sebastian Sangines is a one-half owner of the premises with Pietro Mantione and they are also partners in a local Chrysler dealership. The premises were bought in March 1987 and the old inactive hotel was renovated for some \$800,000. He or his partner would be in the premises regularly on a Friday or Saturday evening and the general management was done by a paid manager. The staff were instructed to obey the Liquor Licence Act and six pages of "plain language" instructions paraphrasing the sections of the Act were given to all staff members. Various press clippings as to liability decisions were posted and the staff was told to obey the Liquor Licence Act in all particulars.

Some 25 or 30 persons had been barred in the first year from the premises through letters delivered by the police. On the evening of October 29th, a Halloween event was advertised, decorations were put up and some 150 persons were present with two-thirds of them in some costume or disguise.

To prevent underage or barred persons, an employee, Greta Wilson was seated on a stool in the inner entrance to check identification and collect a cover charge and a short line-up occurred due to the processing delay.

The premises are now listed for sale and after the closing on August 7th and 8th, 1989 a 70% loss on average sales occurred in the following two weeks until the volume was rebuilt. The decision of the Liquor Licence Board was dated July 24th, 1989, but was only received on Friday, August 4th at 8:15 in the evening to be in effect as of Monday, August 7th.

Steve McLeod stated that in addition to being the manager that evening, he also was the disc jockey operating from a booth overlooking the dance floor. Using various tapes of musical selections, he could come and go to attend to any problems. He reviewed the closing routine at the premises and said that all patrons were asked for identification that evening due to disguises and costumes being used. He did not see the fight, but learned of it when the police arrived while he was cashing-out the waitresses in a basement room. He thought that the apparently drunken Lang and his party may have slipped through the line-up to enter the premises. Two bouncers were on duty that evening.

Counsel for the Liquor Licence Board noted that there were three matters before the Tribunal as breaches of the Liquor Licence Act and Regulations, namely as set out in the Proposal:

- 5.(iii) contrary to subsection 8(6) of revised regulation 581/80 under the Liquor Licence Act, the licence-holder failed to ensure that evidence as to the age of persons satisfactory to the licence-holder was obtained...prior to serving liquor to a person apparently under the age of 19 years on any premises prescribed by section 51; or
- (iv) contrary to section 43 of the Liquor Licence Act, the licence-holder sold or supplied liquor or permitted liquor to be sold or supplied to a person in or apparently in an intoxicated condition; or
- (v) contrary to subsection 8(4) of revised regulation 581/80 under the Liquor Licence Act, the licence-holder permitted drunkenness or riotous, quarrelsome, violent or disorderly conduct to take place in the licensed premises.

He reviewed the evidence of Shawn Lang, the details of the fight, the lack of control of the staff, and the responsibilities of a licensee. Violations clearly had occurred and there was no evidence to the contrary. The failure to give a

two-week notice of the Decision was regretted since a licensee has to be able to make plans; so the two days already closed should be taken into account in any decision of the Tribunal.

In reply, counsel for the Licensee, referred to the line-up and checking of identification, but could not explain how Shawn Lang entered the premises noting that Lang was uncertain as to whether or not he actually bought any beer or paid any coverage charge, although he did likely consume some beer, and also that even the best trained staff could not prevent a two-punch fight. Reasonable precautions were in place by the Licensee whose employees may have been shown false identification or who relied on the apparent age of the patrons and no charges were laid against any other of the patrons other than Zaya.

The Liquor Licence Board has assessed a penalty of 14 days and in reviewing the evidence, this Tribunal believes that the breaches as set out above did in fact occur. The responsibilities in these matters rest on the Licensee whether or not those responsibilities are delegated to managers or staff.

Having regard to the evidence and having assessed the demeanour and testimony of the various witnesses, the Tribunal by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, hereby confirms the Decision of the Liquor Licence Board for a fourteen (14) day suspension and credits two (2) days already closed; and orders closing of the premises from Sunday, February 18th, 1990 to Thursday, March 1st, 1990.

765131 ONTARIO LIMITED
(BLOOR STREET STATION)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REFUSE TO ISSUE A LIQUOR LICENCE

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
HENRY KREBS, Member

APPEARANCES:

HARVEY FREEDMAN, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

ASHER ETTINGER, a Party

ROBERT BARNETT, a Party

DATE OF
HEARING: 15, 18 and 31 May 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by 765131 Ontario Limited, pursuant to Section 14(1) of the Liquor Licence Act, R.S.O. 1980, Chapter 244 as amended, from the decision of the Liquor Licence Board dated February 23rd, 1989, to refuse to issue a licence for the premises known as "Bloor Street Station", at 459 Bloor Street West in the City of Toronto; which location is at the southwest corner of the T-intersection of Bloor Street and Major Street.

The initial application for a liquor licence was made on August 2nd, 1988, and a public meeting occurred on October 17th, 1988. A decision was issued on October 31st, 1988, and the licence was denied pursuant to Section 6(1)(g) as follows:

in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

The particulars of the public interest were cited as:

- (i) Area residents are increasingly concerned about the proliferation of licensed establishments adjacent to the residential neighbourhood along Bloor Street West.
- (ii) There are 14 licensed establishments within a few short blocks of the applicant's premises.
- (iii) The parking problems facing the residents on adjacent streets were already horrendous.

The hearing of the Liquor Licence Board on this application took place on January 19th and 30th, 1989. The main opponents to the granting of a liquor licence were Mr. Asher Ettinger, whose home is the first residence south of Bloor on the east side of Major Street; and Mr. Robert Barnett, who represented the Sussex-Ulster Residents' Association, and as an architect and restaurant designer had further opinions as to the design, layout and adequacy of the kitchen and other facilities in the project.

Mr. Ettinger presented some 120 letters with 150 signatures in opposition to this licence application which had been returned from a distribution in the area of 288 letters. Opposition centred on the saturation of similar facilities in the Bloor Street West "strip"; the size of this project and the stand-up bar shown in the plans; and the problems in the area resulting from lack of parking, vandalism, noise and rowdy conduct which already overwhelmed the neighbourhood each week-end, particularly because of the popularity and regional attraction of the Brunswick House and four or five other facilities all within several blocks.

Mr. Barnett stated that the size and design of the kitchen was too small for an establishment of 190 seats which led him to consider that this operation was really a bar that would attract even more people to the crowded area. He, too, was concerned about parking problems and the impact of various bodily functions on the sidewalks, lanes and private lawns in the area.

Five other witnesses opposed the licence due to the crowd activities, especially at closing time when the Brunswick House, Paupers, Lee's Palace and J.J. Muggs would all bring many patrons outside with concomitant vandalism, noise, traffic increases and threatening conduct.

Mr. David Stickney, the architect for the Applicants, presented to the Liquor Licence Board plans to renovate this original drugstore and, latterly, music store and equipment rental location. The number of seats applied for was cut from 225 to 190, and sound-proofing, garbage control and some parking were all added to the plans. Some seven witnesses, including the landlord, spoke in favour of the project. The market strategy of the business was admitted as catering to younger singles and problems from other locations were admitted.

The Liquor Licence Board noted:

Had the Applicant been prepared to modify the nature of the proposed operation so that it would be an eating place rather than what Mr. Ettinger characterized as a "booze driven establishment", then the Board would have viewed the application in a different light. The Board is of the opinion that this licensed dining lounge would cater primarily to alcohol and not to food. To permit another such establishment in this area would only exacerbate the problems of the residents. The Board cannot and must not disregard the legitimate concerns that the community has, and must consider the needs and wishes of the residents of the community.

At the hearing, Maura McIntyre brought forward the opinions and opposition to the licence of Councillors Liz Amer and Dale Martin, who represent and the area and by whom she is employed. Councillor Martin added, by letter, his concerns of the large number of licensed premises in the immediate area which are a regional attraction, and of the undermining of the viability and integrity of the residential neighbourhood by another major location. A combination of errors had led to a Building Permit being granted for the premises, but he sought a refusal or a deferral of any liquor licence until rezoning by-laws were in effect.

On Bloor Street West in Toronto, between Bathurst and Spadina Streets, there are some 26 licensed locations in 6 blocks. Mr. Lambert Cheng and 120 others sent letters to the Liquor Licence Board opposing the 225 seat application, and cited rowdiness, parking problems, and traffic pressures in their opposition.

In a four page letter of January 18th, 1989, Asher Ettinger and Penny Shkuda had reiterated to the Liquor Licence Board, their concerns for this application. Because of the interior design of the bar, and the City review of zoning and the current inadequate regulations, they opposed this additional project in an area already saturated with licensed premises with of all sorts. A further letter to the Tribunal on April 28th, 1989, repeated Mr. Ettinger's concerns.

The hearing of the appeal before this Tribunal took place on May 15th and 31st, 1989. Mr. Ettinger and Mr. Barnett were joined by 16 other area residents to oppose the granting of a licence.

Greg Hancock is the Vice-Chairman of the Annex Residents' Association, whose area is to the north of Bloor Street. While local places had served the area in past years, now he noted some 106 licensed locations in the area and also the increased noise, litter, parking problems and vandalism that such a situation brings as a regional attraction. He acknowledged, on cross-examination, that there was no meeting as such or any resolution of the Annex Residents' Association to oppose this application, and that the problems, of course, come from existing locations including the Brunswick House which appears a major source of annoyance, but is always excepted from complaint because of its historic function in this area.

All witnesses in opposition brought their own views on the general themes of noise, vandalism, mob psychology at closing time, parking strains, garbage and litter. They spoke of the quality of life for the residents who are adjacent to a very busy and lively commercial area. They know that they live in a part of Toronto which will have pressures from the attractions on Bloor Street West, but they were all of the view that the addition of a major location, where from 5 to 10% more seats would be added in the area, was just too much for them to accept; and they asked that their problems not be added to by the granting of this licence.

The number of seats at the various major locations were said to be as follows: Brunswick House - 486; Lee's Palace - 260; J.J. Muggs - 280; and Pauper's - 300. While the Bloor Street Station had been 225 originally applied for and then 190, even the present 160 seat application was seen by them as being in the same category of larger, impersonal locations.

Mr. Ettinger repeated his earlier concerns to the Tribunal. His home is a century-old wood frame structure, so the street noise does penetrate and has an effect upon his young

family. He sees this licensed location as a major strain to the area where more of the "beer commercial" crowd will be attracted to a booze-driven premises. He said that the delay of nine months where the business could have been opened as an unlicensed restaurant shows that the real desires of the Applicants are not in the purveying of food, and that the proposed menu does not add anything to the community. He stated that the police have failed to enforce parking rules and to respond to complaints of fights, vandalism and rowdy conduct.

On behalf of the Applicants, Gerald Warren, the chef and food/manager for Bloor Street Station, explained the choice of menu items and the kitchen layout. The menu is "Cajun type" with 5 of 17 entrees being in the currently popular Louisiana style. With moderate prices, the now 160-seat location would be adequately served from the kitchen as planned.

Then David Stickney, the architect for this project, reviewed for the Tribunal his own experience in the design of more than 30 locations from initial brand new plans to renovations to lesser changes. He reviewed more than a dozen parts of Toronto, including Queen Street West, Yonge Street, Yonge and Eglinton area, Spadina and the Danforth. He compared distances, traffic volumes, zoning and numbers of locations, together with public transit and parking facilities.

He noted that many parts of Toronto are "regional locations" which draw people downtown in the evenings and serve much more than a local population. He counted 38 licensed locations in the Bloor Street West area and that compared readily with the numbers elsewhere. He reviewed the changes accepted by the Applicants as this project developed. These included an entrance only on Bloor Street, indoor garbage storage, some parking, "morality" parking at the rear, thermal pane windows and glass bricks to cut noise, alarmed doors, a low music volume system, no stage or live entertainment, no dance floor, discreet signage, no patio sought and no stand around area at the bar.

He believes the kitchen is adequate and that a moderately price "Cajun style" location would be popular and is needed in the area. He noted that the Building Permit would have been received under the holding By-law 994/88 and under the new By-Law 99/89. He acknowledged the recent closure of two large premises in the area, each with more than 200 seats and that there are some 2,000 to 2,200 seats in the local premises now. Parking is difficult, but the area is on the subway which many use. The Greek area on the Danforth and the Chinese area on Dundas Street West were similar, with the greater pressure in the Bloor Street

area coming from the University population due to the proximity of residences on the campuses.

Eight witnesses spoke in favour of the application, including Tom Lennox, a Past President of the Ontario Restaurant Association; Andrea Kristof, a local architect who found the kitchen found satisfactory and Harvey Starkman, a representative of the owners of the building who noted that only restaurants could afford the high rentals which the area requires for business premises.

Dennis Rawlinson is a 45% owner of the Applicant corporation and has 21 years of restaurant experience, including a part ownership in the Brunswick House for 4 recent years. He provided two petitions to the Tribunal which he had collected. The first was signed by representatives of 34 local businesses, both licensed and unlicensed food premises and of other kinds. Of the 50 canvassed, these 34 had no objection to the liquor licence application and the others declined only because of a lack of authority to sign such a document. There were none in direct objection.

He had also collected some 1,300 signatures from passersby and from canvassing. Of these some 119 had area addresses and another 34 were from an apartment building at 10 Walmer Road. Mr. Rawlinson proposes to have a full service, moderately priced, sound-proof location with no live entertainment or dance floor, and which is not "booze-driven". He has already spent some \$400,000 on renovations and rentals. He acknowledges the many concessions referred to by Mr. Stickney and believes that his menu and premises are needed in the area as a positive attraction which would be owner operated.

Counsel for the Liquor Licence Board in argument cited for the Tribunal the case of 670875 Ontario Limited (Elm Flameburger) which was heard on September 14th and 15th, 1987 and which is reported in 16 CRAT (1987) Summaries of Decisions at page 103.

Counsel pointed out the similarities between that case and the present one before the Tribunal in that a licence had been applied for in a residential area which had a stable community, that renovations had begun and there was community protest which was supported by a Residents' Association. That decision stated as follows:

The residents, in their letters and testimony cited the present problems in

their community of drunkenness, vandalism, rowdiness, noise and parking. They were very much concerned that even a limited dining room licence would greatly exacerbate these problems. In addition, and part of the problem is the perceived lack of prompt response by the local police when complaints are made to them. The residents were not prepared to accept the reassurances of the Applicant that the premises would not turn into a student pub. Based on their past experience, many of the residents expressed the view that the two individuals were not to be trusted in this regard, although there was no suggestion that the managers were incapable of operating a restaurant.

In addition, local elected representatives were opposed to the application and while some were in favour as witnesses for convenience and price, the Tribunal noted that there were many other facilities close at hand. The Tribunal in refusing the licence and upholding the earlier refusal by the Liquor Licence Board set out the criteria to be considered which are as follows:

In reaching its decision, the Tribunal has been guided by the following principles which have been enunciated from time to time in its previous decisions:

- the public must be aware that under the Liquor Licence Act, a person is entitled to a licence unless he becomes disentitled under any of the clauses (a) to (g) inclusive of Section 6(1) of the Act;
- since a person is entitled to a licence, the onus is on the objector to prove, on the balance of probability that, in this case, it is not in the public interest to issue it;
- the public interest must be determined in light of two aspects - (a) needs and (b) wishes;
- the issues of needs and wishes will not be decided solely on the basis of a head count;

- the concerns of the objectors must be bona fide; and
- the needs and wishes of the immediate residents will be given more weight than those of the transient trade.

The differences between the Elm Flameburger case and the one before the Tribunal are that the restaurant in the present case is not in operation, while the Elm Flameburger Restaurant had been there for more than 35 years. In addition, the residences are not just one inch away, but are separated at least by a lane from the commercial strip on Bloor Street.

In the present application, the objections are for all new locations and for any new liquor licence. The points have been made that the area is saturated, that the specific plans of the location are questioned and that rowdiness, vandalism, noise and traffic difficulties, including lack of parking, are burdens to the residents in the area. Council submitted that all of the criteria set out in the Elm case had been met and that, accordingly, that the Tribunal should deny the application for a licence.

In reply, counsel for the Applicants set out the proportions that should be considered with respect to accepting petitions and he cited for the Tribunal the Colorbar Restaurant Incorporated (Babbages's Restaurant) decision, which was heard on May 1st, 2nd and 9th, 1984 and is reported in 13 CRAT (1984) Summaries of Decisions beginning at page 46. In this case, the original application had been refused and the application was allowed by the Liquor Licence Board. An alderman of the City of Toronto cited a resolution passed in 1979 which had not been heeded and the zoning, while appropriate, was opposed by some 240 signatories of persons living in the area. Other petitions of some 1,500 in support were questioned because many lived more than one-half mile from the location.

Again, it was cited that problems in the area would become worse and there was an attempt to balance the difficulties that existing places brought to the community with the attributes that this location might bring. Another city alderman was in support of the licence and on the questions of the needs and wishes of the community, the balance had 9 witness opposed, with 223 signatures opposed compared with 7 witnesses in favour and 1,400 or more petition signers in favour; and an alderman on each side of the case.

The onus was cited in this case to be on those opposing and since there were no ratepayers' groups opposed, no action by the City of Toronto, no increase in nuisance, proper zoning and a business that was a high quality dining lounge which had been in operation for 4 months, the Tribunal granted the liquor licence.

Counsel also cited the case of Pros Restaurant which is reported at 4 LLAT (1979) page 91. This was a modest family run operation which had existed for three years in a small plaza with nine other business, that was one-half mile from the closest licensed establishment. Objections to the issuance of a liquor licence were based on two resolutions of the counsel, a letter from the local member of the Ontario Legislature, petitions signed by 341 persons, 4 letters, the views of one of the local alderman, several other direct witnesses and statements of opposition by some 750 persons and 4 other Associations. In favour of the application were 4 letters, 453 persons who signed petitions, 795 form letters and the views of one alderman.

The Tribunal stated:

The legislation provides that public interest must be determined in the light of 2 aspects. Firstly, regard must be had to both "needs" and "wishes"; consideration and weight must be given to both factors. Secondly, these 2 aspects must be examined in the context of the public of the municipality in which the premises are situate, not in the context of just the particular public resident in the vicinity where the premises are physically situate. Consideration cannot be restricted to that of "needs" alone or "wishes" alone, nor to either of these matters from the point of view of one particular group.

and further

...the views of those of the immediate neighbourhood as to the effects, and accordingly their needs and wishes are more significant because they are most directly affected by the physical presence of the licensed establishment.

and further

A mere count of names to arrive at a majority is not the proper course.

The Tribunal concluded:

The needs and wishes of those who support the issuance of a licence to Pros Restaurant can be satisfied at other licensed establishments within the municipality, but the needs and wishes of those who oppose the issue can only be met by a refusal to issue. The Tribunal is of the opinion that the situation is exactly that envisaged by the Legislature in its enactment of Section 6, subsection (1), paragraph (g) of the Liquor Licence Act, 1975.

In that case, the Applicant reminded the Tribunal that there was no resolution from either interested residents' association and that any claims of lack of parking, noise, vandalism and safety were the responsibilities of those other than this Tribunal. No patio was sought at that point and the conditions as set out in the list reviewed by Mr. Stickney and acknowledged by Mr. Rawlinson would be acceptable.

Counsel for the Applicant also referred the Tribunal to the recent decision in the matter of 679604 Ontario Limited (Berringer's Tavern) which was released on April 17th, 1989. Again the onus was shown to be on the objectors, the two show that the needs and wishes of the community were in opposition to the routine granting of a liquor licence.

In this case, a tavern operated for more than 50 years in the Windsor area would have had an automatic renewal of its licence, but for a fire which damaged the premises. There was found to be no expectation of the neighbouring community, that there would ever be a change in this location which had been a non-conforming use for those years. Parking was cited to be a responsibility of the city officials and the premises were in operation during their renovated state for some ten months without a liquor licence and without any problems. The objectors knew of the continuing business and many would not go into the new premises even though it had been completely redone and was now under new and responsible management. In the Berringer case, the principles as set out in the Elm Flameburger case referred to above, were reviewed.

Those principles were not followed for the particular reasons that the operation was in a non-residential area, had been in operation for some 50 years, problems in the community were less and not being aggravated by this location and there was not a transient group using the facility.

In addition, the case of Bordeaux Restaurant Limited 17 CRAT Summaries of Decisions (1988), page 1 was referred to the Tribunal. In that case, the Tribunal stated as follows:

Such matters as parking and traffic are a municipal responsibility. However, the Tribunal takes the position that the rules with respect to the interpretation of Section 6(1)(g) have been established in many prior decisions of the Tribunal and that these decisions have become entrenched and established the rules to be followed by a licensee or applicant. It is the responsibility of the Tribunal to hear the evidence by way of a hearing de novo and the evidence and exhibits that will be considered are that evidence and those exhibits which are tendered before the Tribunal. The Tribunal has the responsibility of hearing the evidence relating to the application of Section 6(1)(g) and making its decision on that basis.

The onus as set out in that decision by the Tribunal was said to be as follows:

The onus is on the Board or any other persons opposing the issuance or renewal of a licence to show why such licence should not be issued or granted.

The Tribunal has carefully consider the information presented by the witnesses on both sides of this matter. We acknowledge that there must be some current community standards in these matters and we approve of the principles as set out in the Elm Flameburger decision.

Accordingly, we find that the onus has been met by the objectors in this case and that the needs and wishes of the community are to not have this licence granted. In this application, the concerns of the objectors are bona fide and the immediate residents oppose this application.

Therefore, by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby confirms the decision of the Liquor Licence Board dated February 23rd, 1989, whereby it refused to issue a dining lounge licence to the Applicant.

307855 ONTARIO LIMITED
(BILLY ROSE PALACE RESTAURANT)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO SUSPEND THE LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
ROBERT COWAN, Member

APPEARANCES:

A. DOUGLAS BURNS, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 12 January 1989

Toronto

REASONS FOR DECISION AND ORDER

In this matter involving certain infractions under the Liquor Licence Act, the Liquor Licence Board after a due hearing suspended the licence of the Applicant for five days.

Counsel for the Board and for the Applicant today have agreed on certain facts and that now being common ground, the Tribunal takes it that the incidents involving infractions on January 27th, 1987, March 28th, 1987, and July 11th, 1987 where intoxicating liquor was sold to persons under the age of nineteen years of age did occur and, therefore, are not controverted. We appreciate the consideration of both counsel in saving us a much more arduous and lengthy hearing. As well, we understand the position of both counsel, one requesting on behalf of the Board that the decision of the Board at least be upheld and Mr. Burns on behalf of the Applicant directing our attention to the mitigating circumstances which he points out have existed since the last offence.

We might point out that in our deliberation, we have given consideration not only to the mitigating factors which, in our view, have tempered the judgment, but also to the fact that when you punish the guilty, you also penalise the innocent. In saying that, the Tribunal means only that employees of the Applicant would, as a result of a lengthy suspension, no doubt suffer and that is something, if possible, to be avoided.

There is the mitigating factor of the type and nature of the business. In this case, this is not an ordinary tavern. It is a tavern supplying, what we might call "exotic entertainment" and, therefore, attracts perhaps a more youthful crowd, but on the other hand, the very fact that it does that and is engaged in that type of business is something which should put the management on notice that they should be much more diligent perhaps than in another type of operation.

The incidents involving seven individuals, one with a false I.D., two with valid identification cards, and four with no identification cards whatever, indicate that there is an infraction on the three occasions referred to of Section 44(2) of the Liquor Licence Act. That being so and having said that we have considered all the mitigating factors, which also include the length of time that this matter has gone on and it has apparently gone on for at least two years and has now come to this Tribunal, that again is another mitigating factor. Whether or not the postponements, the delays have been the fault of either party we impute no fault to either. But it is something to be considered in the light, particularly, of the fact that there are no offences subsequent to the last one in July 1987 with which we have to deal. Since that time, the operation of the premises seems to be without blemish and we trust that it will so continue.

Having considered all the circumstances, we have concluded that the tavern should be closed for a period of three days.

Accordingly by virtue of the authority vested in it under Section 14(3) of the Liquor Licence Act, the Tribunal hereby alters the Decision of the Liquor Licence Board dated the 22nd day of June, 1988, and orders the Applicant's licence be suspended for a period of three (3) days. The date of such suspension to be determined by the Board.

RENAISSANCE FUNDING CORPORATION

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MORTGAGE BROKERS

TO SUSPEND OR REVOKE A REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ERIC EXTON, Member

APPEARANCES:

J.B. DONNELLY, representing the Applicant

THOMAS DRUYAN, representing the Registrar under the
Mortgage Brokers Act

DATE OF

HEARING: 4, 10 October 1989

Toronto

REASONS FOR DECISION AND ORDER

This appeal arises from the Proposal of the Registrar of Mortgage Brokers to suspend the licence of the appellant corporation, Renaissance Funding on the grounds that its business will not be carried on in accordance with law and with integrity and honesty contrary to Section 5(1)(c)(ii), Mortgage Brokers Act.

The facts as the Registrar has set them out are not seriously in dispute and, therefore, may be related here as they appear in the Notice of Proposal.

1. The Registrant is a corporation incorporated under the laws of the Province of Ontario. Its President and Sole Director and Officer is Anna A. Peschmann.
2. The Registrant has been registered as a mortgage broker under the Act, since on or about October 6, 1986.
3. As a term of its registration the Registrant entered into an undertaking. This undertaking was required as a result

of Dieter Peschmann, the spouse of Anna A. Peschmann, having pleaded guilty, to the charge of fraudulently removing or concealing assets of himself and of Anna A. Peschmann contrary to section 169(g) of the Bankruptcy Act, R.S.C. 1970, c.b-3, as amended.

4. Sometime in the month of September, 1987, Dieter Peschmann, an employee of the Registrant, brokered a mortgage to Coronet Trust and Beneficial Canada Inc. In so doing, Mr. Peschmann, altered the salary confirmations of the borrowers to include overtime earned. The forgery was detected by Coronet Trust and Mr. Peschmann was charged with fraud under section 325(1) of the Criminal Code of Canada. Mr. Peschmann pleaded guilty to the charge and was fined \$3,000.00.
5. The facts surrounding the conviction of forgery relate to a mortgage transaction between Mr. and Mrs. Evangelista and Coronet Trust, in which Mr. Dieter Peschmann acted as a mortgage broker and as an employee of Renaissance Funding Corporation.
6. A panel of arbitrators appointed by the Ontario Mortgage Brokers Association's ethics committee found Dieter Peschmann to have contravened the association's code of professional conduct. Mr. Peschmann's OMBA membership was suspended for two years.

Counsel for the Applicant takes issue with the statement in paragraph 4 of the Proposal alleging that Mr. Peschmann was convicted of fraud. The conviction was, however, for forgery and that is our finding. Although Mr. Peschmann was an employee of Renaissance Funding Corporation, there was no evidence of complicity between him and any other members of the company involving the offence. The Registrar, therefore, has had no objection to the company continuing its business with Mrs. Peschmann, the wife of the offender as its President. The only issue raised by the Registrar is the continuing employment of Mr. Peschmann with the company. As a result, Anna Peschmann found herself in a difficult if not untenable position, in that she was

obliged and expected to take disciplinary action against her own husband. She did so in a letter dated October 23rd, 1987 as follows:

October 23, 1987

Mr. Dieter Peschmann
c/o Renaissance Funding Corporation
257 Danforth Avenue
Toronto, Ontario
M4K 1N2

Re: Evangelista Mortgage Application to Coronet Trust

I have reviewed the above mentioned matter and it is clear to me that you have acted improperly and without approval of Renaissance Funding Corporation.

In your letter to Coronet Trust and to Renaissance you have however, explained fully the circumstances behind your actions, and you have made no attempt to conceal your improper handling of the affair. You have also assured me that you have not done anything improper in respect to prior transactions in which you were involved while employed by Renaissance. You have also assured me that your future dealings will adhere strictly to the policies of Renaissance.

In light of your full apology and explanation, your past efforts and work on behalf of Renaissance and your assurance to conduct yourself properly in the future, Renaissance Funding Corporation is prepared to continue your employment.

Any future actions, which may reflect adversely on Renaissance's reputation will be dealt with swiftly. Please guide yourself accordingly.

Yours truly,

Anna A. Peschmann
President

Having received this reprimand, Mr. Peschmann continued his association and employment with Renaissance, but the Registrar considered Mrs. Peschmann's action to have little significance and in a series of four letters suggested a temporary suspension of Mr. Peschmann from the company's business to be a reasonable resolution of the matter, which would also give the public and the industry notice, that the offence warranted further discipline.

In his letter of June 27th, 1988 the Deputy Registrar proposed to Mrs. Peschmann, a suspension of Mr. Peschmann from the company for a period of two months. It appears that Mrs. Peschmann could or would not agree to this and in his letter of August 24th, the Registrar then proposed a suspension of three months. Again Mrs. Peschmann refused to comply and on December 28th, 1988, the Registrar wrote the following letter to Mrs. Peschmann:

December 28, 1988

Renaissance Funding Corporation
257 Danforth Avenue
Toronto, Ontario
M4K 1N2

Attention: Mrs. Ann A. Peschmann

Dear Mrs. Peschmann:

We have for some time now been reviewing the circumstances surrounding your husband's conviction for forgery in order to determine the appropriate condition to be recommended by this Ministry and to be consented to by you under Section 5(2) of the Act. As you are aware, I have the power to propose to refuse to renew a registration where "the past conduct of (the corporation's)...officers or directors affords reasonable grounds for the belief that its business will not be carried on in accordance with law and with integrity and honesty". In a case such as this I believe the action of the only officer and director in not taking appropriate disciplinary action against an employee of the corporation who has committed an offense constitutes grounds for such a decision, a decision not to renew an application.

Given the serious nature of the offense, Mr. Peschmann's previous conviction and the fact that he is for all practical purposes the operating mind behind the company, I am formally recommending the suspension of Mr. Dieter Peschmann from the premises and activities of Renaissance Funding Corporation for a period of three months. I will have the necessary Terms and Conditions prepared for your signature and forwarded to you as soon as possible. Failure to sign the Terms and Conditions within two weeks will lead to my proposing not to renew the registration of Renaissance Funding Corporation. Failure to abide by the Terms and Conditions once signed will result in my proposing to revoke the registration of Renaissance. A proposal not to renew or to revoke a registration is, of course, appealable to the Commercial Registration Appeal Tribunal.

Once the Terms and Conditions are signed the registration of Renaissance will be renewed for six months.

Yours truly,

T.T. Robins
Registrar

This letter was followed by further correspondence to Mrs. Peschmann on February 20th, 1989:

February 20th, 1989

Renaissance Funding Corporation
257 Danforth Avenue
Toronto, Ontario
M4K 1N2

Attention: Mrs. Ann A. Peschmann

Dear Mrs. Peschmann:

Further to my letter of December 28, 1988, I am enclosing for your signature your

agreement to suspend Dieter Peschmann for a period of three months, the suspension to begin March 1, 1989.

Failure to sign the enclosed by March 1 will leave me no alternative but to propose not to renew the registration of Renaissance Funding Corporation.

Yours truly,

T.T. Robins
Registrar

It appears that Mrs. Peschmann continued to refuse to negotiate with the Registrar on the terms proposed, but in a letter to the Ministry of Financial Institutions, mortgage brokers section, on April 26th, 1989, advised that she intended to appoint Mr. Peschmann as a director of the company since he had now successfully completed his examinations under the Ontario Mortgage Brokers Act. This culminated in the Registrar's reply contained in his Notice of Proposal dated May 19th, 1989 to suspend the licence of the company and is now the subject of this appeal.

It is unfortunate that this matter could not have been resolved before it ever reached this stage. The offenses are admitted and, in our view, the disciplinary action proposed by the Registrar not unreasonable. We are fully aware of the very difficult position Mrs. Peschmann found herself in through no fault of her own. She had considered Mr. Peschmann's contribution to the company in the past as invaluable and even at the present as indispensable. The evidence indicates without doubt Mr. Peschmann was the guiding force and influence in the company and was responsible in a large degree for its success.

In his defence, Mr. Peschmann points out that the conviction for forgery was the only offence he had committed in eighteen years of employment in the field of finance. His counsel attaches no significance to the offense under the Bankruptcy Act since he was given a conditional discharge. There have been numerous character references presented in evidence - all of which are no doubt sincere and honestly reflect the opinions of those who had over the years dealt with Mr. Peschmann.

The only issue before us, in our view, is whether or not the Registrar was right in proposing the Company's suspension if it continued to employ Mr. Peschmann. In that connection, we are guided by Divisional Court in the case of Brenner vs. Registrar of

Motor Vehicle Dealers and Salesmen where it was held that:

...unless the Tribunal can find that it [past conduct] does not [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his Proposal.

The Registrar's Proposal is to suspend or, in the alternative, revoke the licence of Renaissance Funding Corporation because of its continued association with Mr. Peschmann. We understand and appreciate the unfortunate position of Mrs. Peschmann. She has demonstrated a singular and unswerving loyalty to her husband, but to the detriment of herself and her company. The matter could, of course, have been resolved by Mr. Peschmann disassociating himself from the company. It would appear to have been in the interests of all concerned had he been somewhat less tenacious in his determination to remain with Renaissance.

In our opinion, the Registrar's initial proposal to Mrs. Peschmann of a two month suspension was reasonable in view of all the evidence. Much time has elapsed while negotiations were being carried on between the parties and there have been no further complaints. Nevertheless, we consider it mandatory from the point of view of the perception of the public and the industry that the Registrar be directed to carry out his Proposal on the following terms and conditions:

1. There will be a two month suspension of Mr. Peschmann's association with the business of Renaissance Funding commencing December 1st, 1989, and such terms and conditions as the Registrar may impose pursuant to his letter to the Applicant of December 29th, 1988.
2. If he is now a director of Renaissance, Mr. Peschmann will resign forthwith and will not be appointed as a director for a period of twelve months from the date of his resignation.
3. In the event the above terms are not complied with, the Registrar is hereby directed to carry out his Proposal.

ASSOCIATED AUCTIONEERS INC.
and JOHN BRUCE MCKENZIE

APPEAL FROM A DECISION OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
TIBOR PHILIP GREGOR, Member
ROBERT A. CONNOR, Member

APPEARANCES;

ROSS R. NICHOLSON, representing the Applicants

GAIL MIDANIK, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

DATE OF

HEARING: 18 July 1989

London

REASONS FOR DECISION AND ORDER

This is an appeal by Associated Auctioneers Inc. ("AA Inc.") and by John Bruce McKenzie ("McKenzie") from the Proposal of the Registrar, Motor Vehicle Dealers and Salesmen made on November 20th, 1987 pursuant to Section 7(1) of the Motor Vehicle Dealers Act, which was to refuse registration as a motor vehicle dealer and a motor vehicle salesman respectively. A Notice of Further and Other Particulars was issued on March 13th, 1989, and after an earlier adjournment on consent, the hearing requested on December 4th, 1987 by the Applicants took place in London, Ontario on July 18th and 19th, 1989.

Section 5 of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 is as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business; or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the Regulations.

In the Proposal of the Registrar, the refusal to register AA Inc. was based on subsections (1)(c)(2) and (1)(d) of Section 5. The refusal to register McKenzie was based on subsections (1)(b) and (1)(d) of Section 5.

The Registrar alleged that AA Inc. is an Ontario corporation begun on or about February 18th, 1985, with head office at 1888 River Road, R.R.#8 in London, Ontario. The incorporating officers were shown as McKenzie as President, and Bruce Roy Rathwell as secretary. An application for the registration of AA Inc. as a motor vehicle dealer was made on June 9th, 1987.

In the application for the corporation's registration, McKenzie showed himself as the sole shareholder and the sole officer and director of AA Inc. In his own application as a salesman, McKenzie said that he would be also employed as an auctioneer for McKenzie Auction Company; where he had been working for some eight and one-half years. McKenzie was born on March 9th, 1955 and is now thirty-four years of age.

In his answer to question 7 of the application which referred to conviction for any offence, and requires full particulars, if any, McKenzie answered "No". A search of the appropriate records subsequently turned up three speeding convictions on January 4th, 1985, and on May 20th and October 22nd, 1986. And further with respect to "any such offence proceedings pending", both the AA Inc. application and McKenzie's own showed by the answer "No", an ignoring of the charges laid against both on March 9th, 1987 for carrying on the business as a vehicle dealer without being registered under the Act. A trial on September 24th, 1987 of those charges led to convictions of both Applicants with fines levied against AA Inc. of \$2,500 and against McKenzie of \$200.

McKenzie as the sole principal of AA Inc. was found to have sold motor vehicles entered by the public at auction to other members of the public. AA Inc. was not a registered motor vehicle dealer while so doing, nor was McKenzie registered as a motor vehicle salesman. These were breaches of Section 3(1)(a) and 3(1)(b) of the Motor Vehicle Dealers Act respectively.

Further, the Registrar noted that both McKenzie and AA Inc. were selling by auction vehicles owned by other registered dealers to members of the public. This procedure also requires registration which had not been done.

No registration as such is required to conduct the business of auctioning vehicles owned by dealers to other dealers as long as members of the public are not involved or even present (Regulation 665, section 14.2).

McKenzie's procedures for these mixed Thursday evening events in London had been discussed since early 1986 by him with the former Registrar of Motor Vehicle Dealers, the present one, and in writing with the then Minister of Consumer and Commercial Relations, the Hon. Monte Kwinter as well as with the Premier, the Hon. David Peterson.

On each occasion, he was told that his practices were in breach of the Act, but he went ahead citing the need in his community for this type of mixed auction event which is very popular and he sought changes in the Act to include public auctions under the same exemption procedure of dealer auctions.

The convictions were upheld on appeal on July 7th, 1988. Meanwhile, further charges were laid on November 13th, 1987 and guilty pleas were entered with convictions on December 14th, 1988, wherein fines were levied against AA Inc. for \$5,000 and against McKenzie for \$1,500. These are all set out in the Notice of Further and Other Particulars dated March 13th, 1989.

The Registrar's Proposal also raised the matter of the answer given to Question 8 of the application which concerns any undisclosed financial interests by others in the business. The reply by McKenzie of "No", did not match a search of corporate records which continue to show Bruce Roy Rathwell as an officer and director of AA Inc.

All of these matters led the Registrar to set out in paragraph 40 of the Proposal, the following summary:

In the Registrar's opinion, the actions of Associated, and McKenzie, as Officer and Director of Associated, and, as an applicant under the Act, as detailed above, afford reasonable grounds for belief that Associated and McKenzie will not carry on business in accordance with law and with integrity, and with honesty, and furthermore, that McKenzie and Associated are, or will be, carrying on activities in contravention of the Act or regulations, as they continue to carry on business as a motor vehicle dealer and as a motor vehicle salesman without being so registered, and continue to sell cars from registered dealers to the public, in contravention of the Act.

Al Murray has been a Consumer Service officer with the Ministry of Consumer and Commercial Relations for the past 25 years. His evidence was that he met with McKenzie first in early 1986 and reviewed with him the rules that required registration in order to process sales of vehicles from one member of the public to another or to or from a motor vehicle dealer by a member of the public. The mixing of dealers and the public at McKenzie's

auction event was in contravention of the Act, as explained by Murray to McKenzie. By the review of certain sales agreements, Murray showed that AA Inc. sold vehicles from other dealers after subtracting a fee from the balance received, to members of the public who paid an added fee to the sale price. The sales not occurring at the owner-dealer's premises were also infractions of the Act.

Murray acknowledged that McKenzie runs a courteous and successful business which compares favourably with other dealers, and that there have been no complaints from any buyer. He also stated that no other regular auction events such as McKenzie ran were going on in Western Ontario except for some one-time sales of gathered vehicles sold as part of a farm equipment or bankruptcy sale.

Keith O'Leary has been an Investigator with the Ministry since 1985 and was a member of the team who visited AA Inc. after the sale of February 26th, 1987. Charges were laid on March 9th, 1987 as aforesaid and O'Leary attended the trial on September 24th, 1987, when the convictions as set out were obtained.

After another complaint was received, a second visit by investigators led to the subsequent charges of November 13th, 1987.

Stephen Moody, the Registrar of the Motor Vehicle Dealers Act since October 1987, reviewed the consumer protection aspects of the Act. He reviewed his own meetings with McKenzie and the requirements of registration. The dealer to dealer auction of which there are some twelve operating in Ontario are conducted by private persons and no registration is needed as the public does not attend (Regulation 665, section 14.2).

The dealer to public and public to dealer transactions do require registration under Section 3(3) of the Motor Vehicle Dealers Act. In both latter cases, sales cannot occur off the dealer's premises, unless in the case of exemptions granted to an auctioneer functioning as a dealer or as an unregistered salesman for a dealer who is operating away from his premises.

Where an auction is used from one purchaser to another, the auctioneer becomes a dealer with an entry number and a fee for each vehicle.

Liquidations of equipment and vehicles are exempt where a "branch premises" location is cited and is moved from location

to location as required by the licensed auctioneer. Accordingly the facilitator function which McKenzie has used is not allowed under the consumer protection aspects of the Act even where McKenzie has tried to have a dealer to dealer transfer scheme through the machinery of a second company as the buyer at auction and vendor to the public person who had, in fact, successfully bid for the vehicle.

In the Registrar's view, this kind of sale cannot occur under this "bridging" approach because of the clear definition of "dealer" in Section 1(f). In the newspaper advertisements, indications to the public to come to AA Inc.'s location to buy or sell caused McKenzie to again be acting as a dealer which he is not.

The Registrar explained the activities of other auctioneers as being satisfactory in that:

- a) a branch premises location is created with municipal approval as allowed by the Act;
- b) vehicles are not accepted from other dealers, but the event is ordinarily a wind down of a construction contract or a liquidation;
- c) an automobile Bill of Sale is used so that consumer protection is obtained under the Motor Vehicle Dealers Act; and
- d) dealers do not buy or sell at such events.

In the Registrar's view, McKenzie's business attracts vehicles from other dealers off their own respective premises which is a contravention of the Act and, further, the buyer does not have the protection of the Sale of Goods Act.

The activities of Associated Car Company ("A Car Co.") were described by the Registrar. This business is carried on by a numbered Ontario company and Ms. Leslie Ringheim is the only shareholder. The company has been a registered motor vehicle dealer for over a year at the same address as AA Inc. This address similarity was not noticed at the time and routine registration occurred. Now if a public member buys a vehicle at the auction from a dealer who has it there, the transfer on paper occurs from the dealer to A Car Co., and then to the real buyer with an added fee being charged which is willingly paid by the purchaser. This method is seen by the Registrar to be an attempt

to avoid the Act; and has not been approved or allowed knowingly by the Registrar.

The Registrar acknowledged that the various issues of Mr. Rathwell's involvement and both the driving record and the pending charges not disclosed were of themselves not major items. The real issue was the continuing procedure of McKenzie in having mixed auction events which contravene the Act; and, therefore, in his view, both AA Inc. and McKenzie should not be registered.

Two character witnesses spoke very highly of McKenzie's business ethics and practice. Gerald Cryderman is a Director of the Ontario Auctioneers Association. He is a charter member of that body and has served as its President. He knows McKenzie as a competent, qualified auctioneer and went with him as a member of a delegation seeking changes to the Motor Vehicle Dealers Act and also to allow a form of self-regulation and qualification for auctioneers. Noreen Cooper is the Manager of the Solvency Division in the London office of Thorne, Ernst and Whinney. For the past two and one-half years, she has used McKenzie often to dispose of various vehicles and has been most satisfied with the services he has performed. She stated that McKenzie's honesty, integrity and turn-around time are so good that she uses him exclusively.

John Bruce McKenzie gave evidence as to McKenzie's background qualifications and business practices. An auctioneer for ten years he began a business relationship with Bruce Roy Rathwell who was bought out the following year in 1986. Corporate filings have now removed Rathwell as a shareholder and director, and the business is solely owned by McKenzie. McKenzie wants the Motor Vehicle Dealers Act changed to allow his auction practices to continue, and he has written to and spoken with various elected and appointed persons to encourage such changes.

He continues his auctioneer business in a large building which he leases year-round and conducts sales of real estate, estate effects, consignments and liquidations. Now some ninety percent of his activities involve motor vehicles. In his view, the Motor Vehicle Dealers Act does not meet the needs of current society and he wants to be able to sell to the public and act for dealer and public vendors and purchasers all at the same event.

A strong believer in consumer protection legislation, McKenzie believes that an auctioneer can assist the dealer buyer and the public buyer to fairly complete transactions with a licensed garage doing any vehicle inspections and the immediate resolution of any consumer complaints.

The system now used by McKenzie is believed by him to fall within the Act. A Car Co. is a separate incorporated company owned by Leslie Ringheim. Any vehicle brought in by the public goes on consignment to A Car Co. and is sold to the highest bidder. A dealer, who buys pays AA Inc., who in turn pays A Car Co., who pays the vendor.

If a public member buys a car, a transfer is done for a fee from the vendor dealer to A Car Co., who sells to the successful public bidder.

While the public cannot buy directly, transfers occur for a further fee and A Car Co. charges \$50 on the first \$1,000 of value and \$10 on each subsequent \$1,000 of value, so that a car selling for \$3,000 would have an added fee of \$70. The system is meant to comply with the Motor Vehicle Dealers Act, but as the result of a meeting of October 21st, 1988 with the Registrar and with counsel for each party, the Registrar said that this plan was not acceptable.

McKenzie stated that he has been open and co-operative with the Registrar, and has not attempted to deceive in any way. The three Highway Traffic Act matters were not disclosed because he did not think them criminal matters. The proceedings under this Act were not mentioned because he thought the Registrar was familiar with them. The matter of Rathwell's earlier involvement was not referred to because it was in fact over, although apparently the corporate filing had not been done.

The Registrar returned to confirm that a motor vehicle dealer can use an auction procedure without permission and use his own sales staff at his own premises for his own vehicles, although there may be a municipal licence needed for such auction event.

The dealer cannot sell vehicles off his own premises and, therefore, the Registrar is investigating those various dealers who have used AA Inc. premises to sell their own vehicles to members of the public. AA Inc. is an unregistered motor vehicle dealer and McKenzie is an unregistered salesperson, in the view of the Registrar, and both are unlikely to change their business procedures to comply with the Act.

Separate events for dealer to dealer transfers and for the sale by A Car Co. of its own vehicles to the public or to dealers would be acceptable to the Registrar, but that is not what McKenzie either wants or in fact does.

In her argument, counsel for the Registrar referred the Tribunal to the Brenner decision of the Divisional Court and the following excerpt from that decision is relevant:

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his Proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

A persistent pattern of non-compliance by McKenzie has flown in the face of the decision of September 1988, the repeated advice of the Registrar and correspondence with the then Minister of Consumer and Commercial Relations. McKenzie proposes to continue as he has and this is not acceptable to the Registrar as it is in violation of Section 5(1)(d) of the Act. It may well be that successful lobbying will see the changes to the Act which McKenzie wants, but he cannot simply violate the Act as it now is just because he doesn't like it.

The past conduct of McKenzie; the present operation; the convictions under the Act; and the failure to disclose pending charges when the Registrar could not be presumed to know routinely about them are all serious matters which have caused the Registrar to refuse registration. The Highway Traffic Act matters and the incorrect information about Mr. Rathwell are agreed to be minor and not enough in themselves to deny registration.

Counsel for the Applicants saw the interpretation of the statute advanced by the Registrar to be narrow and not reasonable to current daily life. Since his clients want to carry on business openly to serve the public, they should be encouraged to do so with the Registrar always being able to revoke registration if problems arise in the future.

The issue for the Tribunal is to determine whether or not to uphold the Registrar. In the light of the evidence before us and with the Brenner decision as a guide, the Tribunal cannot say that the Registrar has erred in his decision to refuse registration to AA Inc. as a motor vehicle dealer and to John Bruce McKenzie as a motor vehicle salesman.

Accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant. The appeal had not been concluded at the time of this publication.

BRIAN DESMOND AUBREY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOSEPH M. GRAHAM, Member

APPEARANCES:

BRIAN DESMOND AUBREY, appearing on his own behalf

JANE WEARY, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 16 January 1989

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Motor Vehicle Dealers Act, to refuse to grant registration to the Applicant as a motor vehicle salesperson. The reason given by the Registrar for his Proposal is that the past conduct of Aubrey affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

The facts are as follows:

On September 29th, 1988, Aubrey applied for registration as a salesperson under the Motor Vehicle Dealers Act and was to be in the employ of Southbank Dodge Chrysler (1982) Ltd., a registered motor vehicle dealer. A copy of the application is filed as Exhibit 5.

In answer to Section 2 of the application, the Applicant disclosed that he had been incarcerated at the Rideau Treatment Centre from May 21st to September 15th, 1988.

In response to question 6 of the application as to whether the Applicant had ever been convicted of an offence, the Applicant responded as follows:

May 20	88	2 robbery	2 years less 3 yrs. probation
Nov 8	82	1 robbery	3 yrs. federal
Nov ?	79	1 robbery	9 months
Dec ?	74	B & E thef	18 months
Summer ?	71-72	Possession Stolen Goods	2 yrs. probation

To the best of my
memory.

The note was signed by Brian Aubrey.

The Registrar had a criminal search conducted against
the Applicant which revealed the following convictions:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
Feb. 15/72 Kingston	(1) Theft Under \$50.00 Sec.294(B) CC (2 chgs)	(1-3) Susp. sent & probation for 2 yrs - restitution
	(2) Theft Over \$50.00 Sec 294(A) CC (2 chgs)	
	(3) BE & Theft Sec 306(1)(B) CC	
Mar. 8/76 Kingston	(1) BE & Theft Sec 306(1)(B) CC	(1-2) 9 mos def & 9 mos indef on each chg conc.
Feb. 9/81 Kingston	Robbery Sec 303 CC	9 mos - prohibited from having firearm or ammunition for 5 yrs.
June 2/82 Toronto	Theft under \$200	7 days
Sep. 24/82 Toronto	Assault CBH	14 days

Dec. 9/82 Toronto	Armed Robbery	3 years
Dec. 14/84		Released on Mandatory Supervision
Sep. 23/85	Mandatory Supervision Violator	Recommitted
Jun. 2/86 Ottawa	Poss. of Stolen Property Sec 312(1) (A) CC (2chgs)	Susp. sent & probation for 18 mos on each chg. conc.
May 20/88 Ottawa	Robbery Sec 303 CC (2 chgs)	2 yr less 1 day & probation for 3 yrs on each chg conc.

The first witness to testify was Mr. Robert Pierce, Deputy Registrar of the Motor Vehicle Dealers Act. He said that after discovering that Aubrey had omitted to set out certain of his convictions, he spoke to Aubrey. He was told that the failure to disclose was not intentional - that Aubrey did not remember the convictions. Mr. Pierce felt that Mr. Aubrey had not intentionally failed to disclose his full record.

Mr. Pierce went on to testify that the Registrar proposed to refuse registration because of the seriousness of Mr. Aubrey's offences and because not enough time had elapsed to establish that he had been rehabilitated.

Mr. Pierce felt that the Applicant could pose a threat to a regulated industry inasmuch, as he had shown in the past, an inability to handle things when they went badly.

Mr. Aubrey testified that his past conduct could not be excused, but that what counted was the person he is now. He stated that since committing his last crime some twenty-two months ago, he had completely reformed. He stated that he has taken no drugs or alcohols in the last twenty-two months and that it was his addiction to drugs, and the need to feed the addiction which had motivated his previous life-style.

His last conviction was for a bank robbery committed in 1987. His probation of three years commences January 17th, 1989 and will continue until January 16th, 1992.

Mr. Aubrey also stated that he is presently employed inventorying cars on a full-time basis at a salary of approximately \$1,200.00 a month. He has worked for the dealership since September 1988.

Ms. Hyacinthe Wade appeared as a character witness for Mr. Aubrey. Ms. Wade is the head of the Special Education Department at Richmount High School. This Department handles high risk students. She met Mr. Aubrey in October 1987 and made him a part of the programme. During the following period, he worked with ten to twelve children suffering from drug and/or alcohol problems. Ms. Wade stated that he worked diligently and was effective in helping the children. She was impressed with his maturity of response. She feels that a sales licence will make the applicant progress faster in his rehabilitation.

The next person to testify on behalf of Mr. Aubrey was Ms. Heather Scully, Assistant Director at Riverside House. This is a half-way house prior to a prisoner becoming subject to parole. She stated that Mr. Aubrey came to the half-way house in September 1988, and during the period he has been there has shown honesty and maturity. She considers him to be a good role model. She also said that Mr. Aubrey had successfully completed his alcohol programme at Rideau Treatment Centre.

The final witness to testify was Alexander McDowell, the President of Southbank Dodge Chrysler (1982) Ltd. He stated that he sought to train people within the dealership. He knew of Aubrey's background and had interviewed him himself. He was very impressed with Mr. Aubrey and was, therefore, prepared to give him a chance to become a salesman for his Company. In the meanwhile, he gave Mr. Aubrey a job to inventory cars, a job he was doing very well. Finally, Mr. McDowell stated that in the event that Mr. Aubrey did not receive his salesman's license, he would, nevertheless, retain him, but with an expanded responsibility and a greater salary.

The Tribunal was very impressed with the testimony and the demeanour of Mr. Aubrey, as well as the testimony of his character witnesses. It is clear Mr. Aubrey has succeeded in beginning the serious task of rehabilitation and reformation. The Tribunal also believes that if Mr. Aubrey continues to carry on in the present fashion, in time he will have demonstrated his rehabilitation. Until such rehabilitation is fully established, however, the primary duty of the Tribunal is to protect the public. This was clearly stated in the case of

David N. Granger and Donald K. Lee (1985) CRAT Volume 14, p.88
at p.94:

The key words in the relative section of the Motor Vehicle Dealer's Act, that is to say section 5 above quoted, are "honesty" and "integrity". Members of the public are entitled to the assurance that salespersons with whom they have been dealing in these very serious transactions (often involving technical and other considerations beyond the scope of their own knowledge and experience) as well as the employers and principals of such salespersons shall be strictly and scrupulously honest.

This is fundamentally important and moreover what the law demands. It is our duty as well as that of the Registrar to enforce that law.

See also the case of Giovanni Giannini (1985) CRAT Volume 14 at p.179 which held:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women.... Only persons of complete trustworthiness should be considered suitable for registration...

(emphasis added)

The Chartrand case had a similar fact pattern to the present one. Chartrand had been convicted of conspiracy to import narcotics and was sentenced to a period of seven years imprisonment. He was released from a half-way house programme approximately one week before the hearing and was on parole until March 4th, 1993.

On the second page of the decision, the Tribunal speaks of the importance of establishing a period of rehabilitation which is long enough to demonstrate that the individual no longer lacks honesty and integrity and will conduct his business in accordance with the law. While this period of rehabilitation may extend up to the end of the parole

period, it may be shorter depending on the circumstances. The Tribunal held that the Registrar was entitled to refuse to register Chartrand.

In the case of Gary Brian Williamson (1987) CRAT Vol. 16 p.266, the Tribunal stated at p.271:

While there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

The case of Frederick A. Bullock (1986) CRAT Volume 15 also dealt with the problem of the rehabilitation period. In that case, Mr. Bullock was employed by a car dealership; he had begun his employment there, just after serving his conviction for theft, as a salesman. At page 4 of its decision, the Tribunal cited the case of Brenner where the Divisional Court said:

The effect of s.7(4) [of the Motor Vehicle Dealers Act] is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The Tribunal held in the Bullock case, that the Registrar was entitled to place some reliance on the past acts of the individual to be assessed. The Tribunal's opinion, moreover, was that not enough time has elapsed to show that Mr. Bullock has indeed reformed. The Tribunal went on to hold:

Given the evidence before it, the Tribunal is of the opinion that the Registrar was not in error in his conclusion. The refusal to register Mr. Bullock as a salesman under the Motor Vehicle Dealers Act will not deprive him of his livelihood. He was and is able to

hold any position with Mr. Silverthorne, other than as a registered salesman. Mr. Bullock is also free to go into sales and marketing, if that is his bent, in any other business that is not regulated by this Province.

The cumulative effect of the number and seriousness of Mr. Aubrey's convictions, the fact that they were committed over a lengthy period beginning in February 1972 and continuing until 1987, some sixteen years, and the fact that his parole period begins one day after this hearing and continues for three years thereafter, lead this Tribunal to the conclusion that the Registrar has not erred in his belief and that Mr. Aubrey should not be registered at this time.

On the other hand, the Tribunal was very favourably impressed by Mr. Aubrey. We believe that, if he continues his employment with Southbank Dodge Chrysler (1982) Ltd. for a period of one year, he will have taken the most important step in proving that he has truly rehabilitated himself. He will then be entitled to make a new application for registration.

By virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Act, the Tribunal directs the Registrar to carry out his Proposal.

PAUL W. BRAYBROOK
(COMA COUNTY CAR)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Chairman, presiding
J. BEVERLEY HOWSON, Member
ROBERT BANNERMAN, Member

APPEARANCES:

PAUL W. BRAYBROOK, appearing on his own behalf

JAMES A. GIRLING, representing the
Registrar of Motor Vehicle Dealers & Salesmen

DATE OF

HEARING: 14, 15 June 1989

Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Registrar of Motor Vehicle Dealers proposes to revoke the registration of Paul W. Braybrook and Coma County Car as a dealer in the purchase and sale of automobiles.

Braybrook was registered as a dealer on the 30th of September, 1987, pursuant to an Order of the Commercial Registration Appeal Tribunal dated September 17th, 1987. In its decision, the Tribunal attached certain conditions to Braybrook's registration as follows:

1. The registration was to be reviewed at the end of six months.
2. The registration was again to be reviewed upon the application for renewal.
3. William C. Theakston was not to be associated in any way with the dealership of Coma County Car.

The matter came before the Commercial Registration Appeal Tribunal at that time as the result of the Registrar's refusal to register the partnership of one William C. Theakston and Paul W. Braybrook operating as Coma County Car on the grounds that due to

the past conduct of the two individuals, the business would not be carried on in accordance with law and with integrity and honesty.

The parties appealed to the Tribunal and Braybrook was subsequently granted registration on the conditions set out above. Theakston having abandoned his appeal was refused registration, and the partnership was dissolved.

The Registrar now proposes to revoke Braybrook's registration under a Notice of Proposal dated February 22nd, 1989, on the following grounds.

1. the past conduct of the registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;
2. the registrant is carrying on activities that are, or will be if the registrant continues to be registered, in contravention of the Act or its regulations, and
3. the registrant has breached the terms and conditions of his registration as imposed by the Commercial Registration Appeal Tribunal or as prescribed by the regulations.
4. the Registrar concludes, or is of the opinion, that the registrant Braybrook by virtue of permitting William C. Theakston to be associated with Coma County Car is contrary to Section 5(2) of the Act in breach of the terms and conditions imposed by the Commercial Registration Appeal Tribunal in its Order dated September 17th, 1987, that William C. Theakston not be associated in any way, either as a partner or an employee or otherwise with Coma County Car.

Ontario Provincial Police Constable George Kleinstein, who had been assigned to the auto theft and dealership section of police investigation was designated to the duties of Inspector under the Motor Vehicle Dealers Act by the Registrar, Mr. Moody. Asked by the Barrie police to conduct an investigation into Coma

County Car operating at 161 Brock Street, Barrie and also on Highway 90 in Angus, he attended at the Brock Street address on September 28th, 1988, where he saw a large sign in front of the building identifying it as the office of Coma County Car.

He testified that he had asked Braybrook for the garage register, but when it was produced there were no entries prior to August 8th, 1988. He also asked for all documents concerning sale and ownerships of about twenty-five vehicles on the lot; nine of those vehicles were registered to Coma County Car. He also noticed the dealership licence on the wall of the office.

Braybrook, in his evidence, said the sign was on the ground and leaning against the building. It was not meant to indicate the business was being carried on at the Brock Street address. He pointed out that the sign was intended for the Angus property where the dealership was being operated and intimated that he could not produce the garage register because he was sure it had been stolen by the Barrie police. The garage register referred to was that which had been used prior to August 8th, 1988. He had not, however, apparently reported the theft. Braybrook also testified he had conducted no auto business at the Brock Street premises, but that it was used solely for his auto body business.

In the meantime, a separate investigation had been conducted by the Barrie police when an undercover Constable, one Tim Nicksey, was involved in four purchases of cocaine from Braybrook and Theakston at the premises at 161 Brock Street. As a result, both Theakston and Braybrook were arrested and subsequently convicted of trafficking in narcotics. The offenses appear to have occurred before the decision of the Commercial Registration Appeal Tribunal on September 17th, 1987, but the convictions were not registered until January 30th, 1989. Braybrook received a sentence of twelve months on each count to run concurrently and probation for one year after his release.

Prior to these convictions however, the Applicant was found guilty of seven counts of fraud which were read into his trial as one indictment and on which he was sentenced to fifteen months' imprisonment on January 27th, 1989. He was also ordered to pay restitution to the City of Barrie in the sum of \$7,887.00. This sum now appears to have been paid by the sale of some property owned by Braybrook and the sale of his auto body business at 161 Brock Street in Barrie.

Although these offenses apparently had occurred prior to the hearing before the Commercial Registration Appeal Tribunal on

September 17th, 1987, the convictions were registered later and the Tribunal, therefore, knew nothing about them. Mr. Braybrook could have advised the hearing of the narcotic offenses, but chose not to apparently since he had not been convicted at that time. There was no evidence of the date of the other offence and it is not recorded in the Certificate of Conviction.

Braybrook's previous criminal record was entered in evidence before the Tribunal at the hearing on September 17th, 1987, and although it is extensive, since it was addressed by that Tribunal, it will not be considered today. We are, however, concerned about the two recent convictions and the fact that the Applicant is still on probation.

We also note that the previous decision of the Tribunal was based partly on the fact that the Applicant had no convictions since 1981 and we quote from the reasons for that decision:

The last conviction, for by far the most serious series of offenses, occurred in August, 1981. As far as the Tribunal is aware, he has had no further encounters with the law in the intervening years.

.....

The Tribunal understands the Registrar's apparent concerns and to some extent shares them. However, the Tribunal is not satisfied, on the evidence, that the public will be at risk or that there are sufficient reasonable grounds for belief that Mr. Braybrook will not carry on business with honesty and integrity or that the business will not be carried out in accordance with law.

The subsequent convictions for trafficking in narcotics cause us concern, but that is compounded by the fact the offenses took place on the premises at 161 Brock Street even though the Applicant alleges this was not the address where the dealership was operating. There is evidence, however, of the sale of two vehicles at the Brock Street address and that is compounded by the fact that Mr. Theakston was involved in those sales. Despite the defence raised by Mr. Braybrook that Theakston had no authority to sell vehicles, we find as a fact that Theakston was involved in the transactions with at least the tacit consent of Mr. Braybrook in direct contravention of the Order of the Commercial Registration Appeal Tribunal of September 17th, 1987 pursuant to which his dealer's licence was granted.

Much evidence has been adduced by the Registrar of other infractions of the Motor Vehicle Dealer Act of a less serious nature, but it would not appear useful or necessary to recite them or deal with them in these Reasons. It is sufficient to say that despite the defence so cleverly presented by Mr. Braybrook and despite his protestations, that each of the Registrar's allegations have been adequately answered, we find as a fact that the Applicant blatantly ignored the Order of the Tribunal and carried on an illicit trade in drugs on his premises which had also been used for the purchase and sale of automobiles pursuant to the licence granted to him by the Tribunal. We find the Applicant's integrity tarnished and his honesty of doubtful substance.

There is some scant reference in the evidence to Mr. Braybrook's registration as an automobile salesman and this is confirmed by the Registrar. We note, however, that the Registrar's Proposal refers only to the Applicant's licence as a dealer and we, therefore, do not propose to interfere with his salesman's licence. We leave it to the Registrar to decide whether or not Mr. Braybrook may continue to operate as a salesman.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

KEITH CHANDLER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
HERBERT KEARNEY, Member

APPEARANCES:

KEITH CHANDLER, appearing on his own behalf

JAMES A. GIRLING, representing the
Registrar of Motor Vehicle Dealers & Salesmen

DATE OF 12 April 1989

HEARING: 5 June 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Registrar not to register the Applicant, Keith Chandler, as a motor vehicle salesperson. The Proposal to refuse registration was made on July 8th, 1988, and Mr. Chandler sent a letter to the Tribunal on July 12th, 1988 requesting a hearing. Notice of a hearing returnable November 2nd, 1988, was sent to the parties, and an adjournment sine die was granted at Mr. Chandler's request with the matter to be brought back on 10 days' notice by the parties.

The matter was brought back to the Tribunal for hearing on April 12th, 1989. In the absence of Mr. Chandler, the hearing began and certain exhibits were filed and three witnesses were heard.

Nr. Marshall Golden, a law student with the Willowdale firm of Juriansz, Li, Marks, appeared to inform the Tribunal that Mr. Chandler was incarcerated at the Mimico Detention Centre and his file had been misplaced during the move of the law firm to new offices.

Counsel for the Registrar showed Mr. Golden a letter to Mr. Juriansz from another Ministry counsel confirming a telephone conversation of October 26th, 1988, in which Mr. Juriansz stated that he did not represent Mr. Chandler.

On hearing from Mr. Golden that his office had been representing Mr. Chandler for the past month, the Tribunal adjourned to June 5th, 1989, with a set of exhibits to go to Mr. Golden since his file was misplaced, and with Mr. Chandler's attendance to be assured by Mr. Golden before the present panel of the Tribunal who are seized of this matter.

On the matter coming on for hearing on June 5th, Mr. Chandler was present without counsel. Counsel for the Registrar reviewed the Proposal made in July 4th, 1988, and noted that the grounds for refusal to register were pursuant to Section 5(1)(a) and (b) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299, namely:

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The particulars were three:

- 1. That because of the delay expected through an investigation of the sponsoring dealership, Mr. Chandler being anxious to be in business attempted to enter the Toronto Auto Auction where admittance is restricted to persons registered as dealers or salespersons, and used a business card from a Ministry official to bolster his claim of being registered or being in the process thereof.
- 2. That Mr. Chandler's disclosed criminal record is:

<u>Date</u>	<u>Charge</u>	<u>Disposition</u>
02-19-1979	Unlawfully at large	Absolute Discharge
07-19-1979	(1) Drive while disqualified (2) Drive while ability impaired	(1-2) 3 months on each charge consec. & probation for 1 year

02-03-1983 False statement to \$200 i/d 60 days
to procure passport
Section 58(2) CC

3. That Mr. Chandler disclosed an Assignment in Bankruptcy made on September 14th, 1984, with claims of some \$91,000, and that he is an undischarged bankrupt.

Counsel for the Registrar filed a Director's Certificate showing that Mr. Chandler had been registered as a motor vehicle salesperson on 12 occasions from March 1970 to September 1984.

Counsel then also filed a Notice of Further or Other Particulars. These were in three other areas, namely:

4. While suspension of Mr. Chandler's driver's licence was disclosed, no particulars were provided; and a search showed five pages of suspensions of licence, with six convictions for impaired driving and also those for speeding and driving while disqualified on several occasions.
5. A series of unpaid judgements was not disclosed and the question therein was answered "No" on the application form; while a search showed in fact nine outstanding judgements against Mr. Chandler.
6. While bankruptcy was disclosed, details were not provided and the Trustee in Bankruptcy's Report showed unsatisfactory performance of duties, failure to attend and the contracting for liabilities knowing of personal insolvency; to the end that Mr. Chandler remains an undischarged bankrupt.

Counsel for the Registrar outlined the issues under financial responsibility as being Mr. Chandler's bad cheques, his personal debts and executions, and his being an undischarged bankrupt. The issues under the integrity and honesty heading were cited as his misrepresentations, his lack of financial resources, his serious driving record, his criminal record and his reputation in the industry.

Daniel Berze, an official of the Ministry, reviewed the meeting he held with Mr. Chandler in early March 1988, and the review of the questions on the application form which he had with Mr. Chandler. Mr. Chandler was seen as being most anxious for immediate registration and was described as a friendly, charismatic person wearing cowboy boots.

Robert Brown was at the sametime the administrative officer in the Motor Vehicle registry and reviewed the application with Mr. Chandler on March 17th, 1988. Mr. Chandler wanted to explain his background and previous registrations. He spoke of successful business operations in the U.S.A. in the past few years and wished to reinstate his earlier registration number, if possible forthwith, so he could get into business without delay. His driving record was explained as the result of a past alcohol dependence over several years.

As a courtesy, Mr. Brown gave Mr. Chandler his business card, so that a call could be made within the next four to six weeks in case registration proceeded promptly so that Mr. Chandler could begin to work as soon as possible. Mr. Chandler was warned against any business activity until registration was completed.

Mr. Brown stated that Mr. Chandler was much more aware of the rules than were most applicants and the delivery of the business card to him did not in any way authorise Mr. Chandler to act as a salesman.

Ruth Hart-Stephens is the General Manager and former founder/owner with her late husband of the Toronto Auto Auction, a privately owned twenty-five year "dealer-to-dealer" operation, which has Tuesday auctions of up to 1,300 vehicles on each occasion. She knows Mr. Chandler as a regular attendee at the auction over the past twenty years, and had barred him in 1985 for certain bad cheque matters.

When Mr. Chandler attended the auction location on March 22nd, 1988, three dealers reported his presence to her and she had him come to her office. She stated that he had shown the business card of Mr. Brown to her and that by telling her all difficulties had been straightened out, he had led her to believe that Mr. Chandler was registered as a salesperson and, therefore, could validly attend the auction event.

She instructed an office clerk to call the Registrar's office to confirm the registration and, when told that the registration was not in effect, she asked Mr. Chandler to leave the premises which he did. Mrs. Hart-Stephens doesn't like Mr.

Chandler and stated that even if he was registered, she would not allow him entry to the Toronto Auto Auction because of past problems and his reputation as she sees it.

Mr. Robert Pierce is the Deputy Registrar of Motor Vehicle Dealers and has had twenty years experience as salesman, O.P.P. investigator, special investigator and Ministry official. He stated that the Registrar or Deputy Registrar becomes involved in a file only when a criminal record or financial problems require their views.

Mr. Pierce stated that he had wanted to revoke the registration of Shah Motors Inc. where Mr. Chandler was to be sponsored since a problem of permanent business location had arisen. Since a problem existed, he was certainly not going to register a salesman to this dealer. The Proposal for Shah Motors was withdrawn when a business premises were proven. That operation is a wholesaler and Mr. Chandler would really be acting independently as a dealer without any supervision. In the result, Mr. Chandler's integrity and honesty were very real issues.

Mr. Chandler's driving record was reviewed, and Mr. Pierce claimed that the length and variety showed a consistent pattern of financial problems due to the apparent inability to pay fines, as well as a disregard for the traffic rules in Ontario. Inadequate disclosure there, as well as the failure to cooperate with the Trustee in Bankruptcy and to disclose the outstanding executions for judgements all led to concerns about financial responsibility and the ability to carry on business in accordance with law, and with integrity and honesty.

Finally, Mr. Pierce noted that, as a result of several driving and impairment convictions in October 1988 at Newmarket, Mr. Chandler was currently serving a term of imprisonment for an eighteen month sentence and had also been ordered not to drive for a period of three years. Mr. Pierce was clearly opposed to the registration of Mr. Chandler for all of these reasons and saw no terms and conditions which could be suggested for a possible registration of Mr. Chandler.

Mr. Keith Chandler presented to the Tribunal his business records for early 1983, which showed great activity and good financial success at a time when he was not dependent on alcohol. As a wholesale dealer, he sent up to 60 vehicles each month to other dealers and buyers with his own guarantee of satisfaction. The comments of the Trustee in Bankruptcy were explained as resulting from his need to leave Ontario for Florida in order to attempt a reconciliation with an earlier wife. Mr. Chandler

disputed the comments of Mrs. Ruth Hart-Stephens as to saying that he was registered or even giving an impression of being a registered salesperson, but rather that he had attended the auction to deliver a vehicle to Mr. Shah. He also disputed the matter of earlier N.S.F. cheques.

The criminal conviction with respect to a passport application for his son in which his own address was used, while the son was in fact with his mother, was an error for which he was fined. Mr. Chandler is at present in jail and has begun an alcoholic recovery program. Involved with the car business since he left public school at the age of thirteen, he has tried to keep in business and has had some success. His alcohol problem began in the early 1970's; was controlled from 1980 to 1983, but revived in 1984.

Mr. Chandler acknowledged a degree of disclosure of all his problems, without making full information available. He said that, if registered, he would hire a person to drive him as required.

In reaching a decision, the Tribunal must be guided by the decision of the Divisional Court in Brenner and the Registrar of Motor Vehicle Dealers and Salesmen dated March 9th, 1983. There, the Divisional Court reviewed the decision of the Tribunal in a case where the Registrar had proposed to refuse registration to an Applicant as a motor vehicle salesman.

...The Tribunal had directed the Registrar to grant conditional registration to that Applicant. The Divisional Court found that the Tribunal erred in its decision in that it failed to direct its attention to the test set forth in Section 5(1)(b) of the Motor Vehicle Dealers Act. The Divisional Court ordered the Tribunal to conduct a rehearing. The Applicant in the Brenner case also had a lengthy criminal record. At page 5 of the Reasons for Decision, Mr. Justice Southey states:

Almost a year has now elapsed since the Board gave its decision. The Registrar did not apply for a stay of the operation of the Tribunal's decision and the result is that Brenner received his licence and, as far as counsel is aware, has been

employed as a motor vehicle salesman by Mr. Winkler's company since April 14th, 1982. In these circumstances, we think it would be unjust for us to set aside the order of the Tribunal and to direct the Registrar to carry out his proposal, which is based on the facts as they existed at July 15, 1981. It may be that the Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offences to which he pleaded guilty.

The proper question at the rehearing remains however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

While no consumer has lost any money or vehicle through the actions of Mr. Chandler, the Tribunal is concerned about the financial responsibility which he has and his ability to carry on business in accordance with law and with integrity and honesty.

Accordingly, we cannot say that the Registrar erred in making his Proposal to refuse registration to Mr. Chandler.

In result thereof, pursuant to Section 7(4) of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299, the Tribunal directs the Registrar to carry out his Proposal.

GREGORY D. KIMBER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN T. HOGAN, Member

APPEARANCES:

H. KOHN, representing the Applicant

ALVIN TORBIN, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 9 January 1989

Toronto

REASONS FOR DECISION AND ORDER

The Registrar has proposed to refuse to grant registration as a motor vehicle salesman to Mr. Kimber because the Registrar is of the opinion that the past conduct of Mr. Kimber affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

The Registrar's opinion is based upon the particulars set forth in the Notice of Proposal. Basically the opinion is based upon two factors. One is Mr. Kimber's failure to fully and accurately disclose all of the details of his criminal record and of his past driver's licence suspensions. Secondly, there is the extensive criminal record itself, which involves some nine or ten convictions over a period of almost thirteen years.

In testifying before the Tribunal, the Registrar stated that his paramount concern was the Applicant's failure to make a full disclosure. The Registrar indicated that he had not examined any of the details of the offences of which Mr. Kimber had been convicted and agreed that Mr. Kimber had disclosed the most serious of his criminal convictions. The Registrar was unaware of the current status of Mr. Kimber's parole. The Registrar agreed in cross-examination that he

had based his decision to refuse registration upon Mr. Kimber's failure to disclose his lengthy criminal record, as well as upon the existence of the record itself. He indicated that he had no knowledge of the Applicant's current course of conduct and that the Applicant's parole officer had not been contacted.

The Tribunal also heard the evidence of the Deputy-Registrar who recommended to the Registrar that registration be refused. The Deputy Registrar testified that he had no knowledge of how Mr. Kimber had conducted himself since his last conviction and has no knowledge of how he conducts himself in the operation of his current motor vehicle repair business.

Mr. Kimber is a licensed motor vehicle mechanic. He owns and operates his own business in Pefferlaw, Ontario. He currently employs three apprentices and is engaged in the repair of motor vehicles - both for private customers and for dealer(s) who then sell the cars on a car lot. He opened the business in April 1986, which was one month after his release on parole after serving a prison sentence for manslaughter. The incident leading to the manslaughter conviction occurred on May 28th, 1982. Mr. Kimber had acquired the property where his business is now located prior to being incarcerated for the manslaughter conviction. Mr. Kimber testified that he is doing quite well in his business and has been able to pay all of his debts and to establish a good credit rating with his bank.

The manslaughter conviction is by far the most serious of Mr. Kimber's convictions. He disclosed the conviction in his application for registration. Mr. Kimber testified that on May 28th, 1982, he was involved in a fight in a bar with his brother-in-law. Mr. Kimber testified that his brother-in-law was involved in another fight later the same evening with another person. The brother-in-law died from the injuries that he received in the course of the two altercations. Mr. Kimber was convicted of manslaughter on March 1st, 1985, and was imprisoned for a one year period before being paroled. He completed his parole on March 1st, 1988.

In October of 1982, Mr. Kimber was driving a Corvette on Highway 427. He was charged with dangerous driving. No accident was involved. He was convicted of this charge on the same date that the manslaughter conviction took place. He did not disclose the dangerous driving conviction on his application.

The manslaughter and dangerous driving convictions are the most recent of Mr. Kimber's brushes with the law. Both convictions arose out of events occurring in 1982. There is no record of criminal behaviour by Mr. Kimber since 1982 (although as noted above, he was incarcerated for one of the intervening years).

In December 1981, while he was in the midst of divorce proceedings, Mr. Kimber had a dispute with his estranged wife about whether he could spend time with his children at Christmas. He was charged with threatening and entered into a peace bond of \$500.00 for twelve months. Mr. Kimber testified that he was not aware at the time that a conviction had also been entered against him. The Tribunal accepts his evidence in this regard. The conviction was not disclosed by Mr. Kimber in his application for registration.

In 1972, when Mr. Kimber was 17 years of age, three convictions were registered against him. His conviction for possession of stolen property over \$50.00 was not disclosed in the application for registration. The break and enter conviction was also not disclosed. The conviction of possession of a narcotic was disclosed in the application, but the wrong date (1975) was attributed to it by Mr. Kimber.

In 1974, Mr. Kimber was convicted of theft under \$200. He failed to disclose this on the application for registration.

In 1977, Mr. Kimber was convicted of possession of narcotics for the purpose of trafficking. He did disclose this offence in his application.

On November 3rd, 1978, Mr. Kimber was convicted of common assault and public mischief. He disclosed the conviction for assault on his application. In respect of the convictions from 1972-1978, Mr. Kimber testified that he was in a youthful rebellious period at the time and that when he moved to Pefferlaw shortly afterwards, it was his intention to turn over a new leaf.

The application for registration also requires the applicant to indicate whether he has ever had a licence or registration of any kind refused, suspended or cancelled. Mr. Kimber answered "NO" to this question, although in fact he had had his driver's licence suspended on three different occasions. The dates of the suspensions are July 31st, 1974, March 14th, 1979 and March 1st, 1985. The last date

coincides with the date of his convictions on the dangerous driving charge, and no doubt the suspension resulted from that conviction.

In December 1987, Mr. Kimber went to the Ministry offices in order to apply for registration as a motor vehicle salesman. He was accompanied by his proposed dealer-employer, Mr. McKay. He testified that after waiting for about 10 or 15 minutes, he was given the application form by a staff person. He did not have a pen and asked to borrow one. While he was waiting for a pen, he read over the application and saw the question regarding prior criminal convictions. Upon seeing the question, Mr. Kimber stated, he became very discouraged as he felt that his serious past record would prevent him from being registered. He asked for a piece of paper to list his convictions on, although he had the sinking feeling that he was wasting his time. Although he did not have all the details of his convictions with him, he set forth the most serious convictions and what he could remember to the best of his ability at that time. He assumed that the Registrar's main concern would be the most serious offences.

In respect of his failure to indicate his driver's licence suspension, Mr. Kimber testified that he did not read the note which states that the question applies to driver's licences, and that he assumed that it referred to a licence such as a mechanic's licence.

Mr. Kimber testified that he did not intend to mislead the Registrar by leaving out information. He felt sure that once he disclosed the manslaughter charge, he would be thoroughly investigated, so that it would have been pointless and stupid for him to attempt to conceal the more minor convictions. He had the impression, albeit mistaken, that he had to complete and return the application without leaving the Ministry offices and did not realize that he could have taken the application home to allow him to get more accurate and complete details from his lawyer or parole officer as to his record.

In the Tribunal's view, the Applicant may have been somewhat careless in completing the application, but having heard Mr. Kimber testify, the Tribunal accepts that he was not attempting to mislead the Registrar. As well, the Tribunal accepts that little, if any, direction was given to Mr. Kimber about completing the application by the Ministry staff. The Tribunal accepts the evidence of Mr. Kimber that

he did not realize that he could have taken the application away with him to complete. Accordingly, the Tribunal is of the view that the failure to disclose the full details of his criminal record and the suspensions of his driver's licence does not afford reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

It remains for the Tribunal to consider whether Mr. Kimber's criminal record should disentitle him to registration.

Although the convictions in this case are serious and span a lengthy period of time, they are not the sole indicator of Mr. Kimber's past conduct as at the date of the hearing before the Tribunal. As noted above, the most recent incidents leading to criminal convictions occurred in 1982. Since that time, no further criminal conduct has occurred. Since shortly after his release from penitentiary in March 1986, Mr. Kimber has established his own business and has made it a success. There was no evidence of any improper conduct on the part of Mr. Kimber in the carrying on of his business. The Tribunal is of the view that the Registrar erred in failing to look at Mr. Kimber's conduct over the last six years. Past conduct as a whole should be considered in forming an opinion as to how an applicant is likely to conduct himself in the future.

The Tribunal has also taken into account that the Applicant's convictions, although including some very serious charges, do not involve fraud of any kind. The theft under \$200.00, possession of stolen property and the break and enter convictions occurred a very long time ago, while the Applicant was still a teenager. He is now 33 years of age.

In the Tribunal's opinion, the Applicant's total past conduct does not afford reasonable grounds to conclude that he will not carry on business in accordance with law and with integrity and honesty.

Counsel for the Registrar referred the Tribunal to a number of authorities, including the decision of the Divisional Court in Brenner and the Registrar of Motor Vehicle Dealers and Salesman dated March 9th, 1983. There the Divisional Court reviewed the decision of the Tribunal in a case where the Registrar had proposed to refuse registration to an applicant as a motor vehicle salesman. The Tribunal had directed the Registrar to grant conditional

registration to that Applicant. The Divisional Court found that the Tribunal erred in its decision in that it failed to direct its attention to the test set forth in Section 5(1)(b) of the Motor Vehicle Dealers Act. The Divisional Court ordered the Tribunal to conduct a rehearing. The Applicant in the Brenner case also had a lengthy criminal record. At page 5 of the Reasons for Decision, Mr. Justice Southey states:

Almost a year has now elapsed since the Board gave its decision. The Registrar did not apply for a stay of the operation of the Tribunal's decision and the result is that Brenner received his licence and, as far as counsel is aware, has been employed as a motor vehicle salesman by Mr. Winkler's company since April 14, 1982. In these circumstances we think it would be unjust for us to set aside the order of the Tribunal and to direct the Registrar to carry out his proposal, which is based on the facts as they existed at July 15, 1981. It may be that the Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offences to which he pleaded guilty.

The proper question at the rehearing remains however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the

Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

It is clear from the reasons of the Divisional Court that it considered it necessary and appropriate to look at all of the applicant's past conduct right up to the date of the hearing, and not simply the existence of a past criminal record. In this case in looking at all of the Applicant's past conduct up to the date of the hearing, the Tribunal is of the view that he ought to be registered as a motor vehicle salesman subject to certain terms and conditions. The conditions are imposed as the result of the Tribunal's view that the Applicant should carry on business as a motor vehicle salesman only under the direct supervision of a dealer for an initial "probationary" period of one year. In particular, the Tribunal wants to make it clear that the Applicant is not to carry on an independent branch operation in Pefferlaw during this probationary period.

In result therefore, the Tribunal directs the Registrar to grant registration to the Applicant subject to the following terms and conditions:

1. That the Applicant's intended dealer-employer, Steve McKay, file with the Registrar a written agreement whereby he undertakes to employ and supervise the Applicant, to provide quarterly reports to the Registrar for one year as to the Applicant's performance as a salesperson and to immediately notify the Registrar in the event of termination of the Applicant's employment.
2. That in the event that the Applicant desires to transfer to another employer, that such dealer-employer provide the Registrar with a written agreement on the same terms as are set forth in paragraph 1.
3. That for a one year period, the Applicant's work as a salesperson shall be restricted to working only under the direct supervision of his dealer-employer and only at such dealer's main business premises.

4. Without limiting the foregoing, the Applicant shall not act as a salesperson or sell motor vehicles out of his business location in Pepperlaw, Ontario during the said one year period.
5. That the Applicant notify the Registrar immediately in the event that he is either charged with or convicted of any criminal offense, or in the event of the suspension of any licence that he holds, including his driver's license.

KENNETH RICE
(BRAM AUTO SALES AND LEASING)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
HELEN J. MORNINGSTAR, Member
J.T. HOGAN, Member

APPEARANCES:
ROSS B. LUNDY, representing the Applicant

JANE WEARY, representing the Registrar of
Motor Vehicle Dealers & Salesmen

DATE OF
HEARING: 3 October 1989 Toronto

REASONS FOR DECISION AND ORDER

Kenneth Rice has been carrying on business as a motor vehicle dealer since July 5th, 1988, when he was registered under the Act as Bram Auto Sales and Leasing.

The business involves the purchase and sale of only used vehicles which Rice usually buys at the car auctions and the class of automobiles Rice deals with is in the \$5,000 category. He, therefore, serves a particular market.

The Registrar now proposes to revoke the registration of Rice and Bram Auto Sales for the following reasons;

On December 13th, 1988, Kenneth Rice was convicted in Brampton on six (6) counts of Fraud over \$1,000 and on one (1) charge of defrauding the public.

The nature of the offenses above-mentioned was odometer tampering concerning the motor vehicle dealership Bram.

At a sentencing hearing held on February 2, 1989 Kenneth Rice was sentenced to 3 months incarceration.

It is, therefore, the Registrar's opinion or conclusion that Bram is disentitled to registration as a motor vehicle dealer under the Act because the past conduct of Bram affords reasonable grounds for belief, that it will not carry on business in accordance with Section 5(1)(b) of the Act which provides;

- 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where

-
(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

The Registrar further points out the following reasons as sufficient grounds for revocation:

1. The protection of the public interest.
2. The perception of the public and those engaged in a similar interest.

In view of the convictions and the fact that they arose from a practice involving the business in which Rice was licensed to trade, we can clearly understand the Registrar's concern. Coupled with that we have the type of market on which Rice depends - the second hand car in the \$5,000 range. The setting back of the odometer in this type of vehicle is tempting when it will bring a few hundred more dollars and both customer and dealer initially are satisfied with the transaction. For the customer, the problems arise at a later date when repairs are needed and he has depended on the odometer mileage as a true reflection of the number of miles the vehicle has been driven. He then may discover as did some of the customers of Mr. Rice that he is a victim of a deliberate fraud.

Odometer tampering, at one time fairly prevalent in the industry, is according to the evidence now rare. The only reason Rice can give is that he engaged in it because he felt he needed that competitive edge. His was a fairly new business in a highly competitive field, particularly in the area where he was located. There are auto dealerships everywhere around him. But he is contrite and points out that not only would he not be doing it again, he realizes there was no necessity for it.

The circumstances of Mr. Rice are perhaps unfortunate: he is thirty-eight years old, separated from his wife and supports an eleven year old daughter. With little education he has become a mechanic, but because he has a serious learning disability he has been unable to obtain his Class A Certificate. He has, however, worked at that level after being employed with both Chrysler and Ford as an apprentice mechanic. The dealership at 7 Hanson Road South in Brampton has a display area to accommodate twelve vehicles. His automobiles are warranted through a company Lubrico Inc., London and in spite of the convictions, the company apparently continues to warrant his vehicles. Concluding his evidence, he says he buys and sells approximately 160 cars per year which is his only source of income and he further states, the business could not survive even a 60 day suspension.

Compassion is so often an ingredient in an appeal and it is evident here. The evidence however tends to militate against it. The offenses were deliberate and for gain - to obtain that competitive edge as Mr. Rice has said - an act calculated to deceive an unwitting customer.

In mitigation, however, we have contrition, the convictions, his incarceration, this appeal and loss of reputation in the industry. We must also note in his favour that Rice compensated each of the six customers involved in the sum of \$1,000 each.

In the case of Scott Burrill 15 C.R.A.T. (1986) at p.93, the Commercial Registration Appeal Tribunal disallowed the appeal and directed the Registrar to carry out his Proposal to revoke the licence of the dealer. In that case, there were three convictions for odometer tampering, but the appellant did not appear at the hearing before the Tribunal. There were, therefore, no mitigating circumstances for the Tribunal to consider. In the present case, however, we have the benefit of Rice's evidence and the opportunity to assess the degree of contrition he has demonstrated. He paid to each of the customers a sum of \$1,000 in an attempt to compensate them for a possible loss, and we are assured that he will not again transgress.

Under the circumstances, we are of the view that a suspension of his dealership licence for a period of 90 days is appropriate, together with the imposition of such other terms and conditions as the Registrar may require.

JOHN ARNOLD ROVERS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
JOHN T. HOGAN, Member

APPEARANCES:

JOHN ARNOLD ROVERS, appearing on his own behalf

JANE WEARY, representing the
Registrar of Motor Vehicle Dealers and Salesmen

DATE OF

HEARING: 16 March 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by John Arnold Rovers from the Proposal of the Registrar of Motor Vehicle Dealers and Salesmen refusing him registration as a motor vehicle dealer under the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299.

The reasons given by the Registrar are that the Applicant is not entitled to registration under Section 5 of the Act as "the past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty."

The Registrar has served three Notices of Proposal, the original and two Supplementary, the latter of which were occasioned as further facts came to light. The reasons in each of the Proposals were the same.

Rovers was originally registered as a motor vehicle dealer and this registration was terminated on December 31st, 1979. His application dated the 5th day of January, 1988, is now the subject of this appeal.

One of the questions on the application is whether the Applicant had ever been convicted of a criminal offence. Mr. Rover's answer to that was "No". He has, however, been convicted of the following offences:

Two convictions for theft of an automobile and attempted theft of an automobile, one breach of recognizance, three convictions for disqualified driving, three convictions for possession of stolen property and failure to appear, four convictions for impaired driving, two convictions for obstructing a police officer, one conviction for obstructing justice and more recently on June 7th, 1988, a conviction for an assault on a police officer and a conviction for obstruction of justice for which he received 60 days and 12 month's probation. There are also two unpaid Judgments outstanding against him which date from 1982 and 1983, and from 1982 to 1988 seven convictions for driving under suspension.

Question 3(b) on the application for registration reads as follows: "Has the applicant ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give particulars. NOTE "Of any kind" includes driver's licence, or any other licence, permit or registration issued by any government body. Rover's answer to this question again was "No".

The following convictions, however, were subsequently revealed and are contained in a Supplementary Notice of Proposal.

The suspensions are as follows: Unpaid fine, Driving Disqualified, Driving Disqualified, Unpaid judgment, Driving under Suspension, Driving under Suspension - Highway Traffic Act, Driving under Suspension - Highway Traffic Act, Unpaid judgment, Driving under Suspension - Highway Traffic Act, Exceed .08, Driving under Suspension, Impaired driving, Driving under Suspension, Impaired Driving, Driving under Suspension - Highway Traffic Act.

Finally, there is an Impaired Driving Conviction registered on the 15th of September, 1987.

A further question, 5(a) on the application, requires the Applicant to reveal any assignment in bankruptcy. Mr. Rovers failed to do this and the evidence is that he was discharged from bankruptcy on October 5th, 1985.

The Final Notice of Proposal served on Mr. Rovers by the Registrar contains the following information:

In addition to the undisclosed convictions already referred to, the Applicant has been convicted on June 7th,

1988 of wilfully obstructing a peace officer and unlawfully assaulting a peace officer with intent to resist arrest for which he was sentenced to 15 days' consecutive on the first count, and 15 days' concurrent on the latter count.

The Applicant was also convicted on June 7th, 1988, for unlawful assault with intent to resist arrest for which he was sentenced to a term of imprisonment of 60 days and probation for 12 months.

The Applicant's probationary period is continuing with a termination date of June 7th, 1989.

This is corroborated by the evidence.

Mr. Rovers has a brother in the auto business in Fort Erie, but does not propose to join him in the dealership. He was apparently a licensed mechanic with his brother for three or four years. His evidence is that after the termination of his licence as a dealer in 1979, he has continued to deal in the purchase and sale of automobiles contrary to the Motor Vehicle Dealers Act. He now proposes to set up a dealership at 77 Niagara Boulevard in Fort Erie where he has a repair facility. Since no evidence of financial responsibility was tendered by Mr. Rovers, one must wonder how he intends to finance a dealership. There are apparently two judgments against him, arising out of claims against the Unsatisfied Judgment Fund which are still outstanding.

When questioned on these, Mr. Rovers seemed to know little about them and nothing about any balances owing. Quite apart from the previous conduct of the Applicant, this Tribunal is bound to consider the Applicant's financial responsibility under Section 5(1)(a) of the Act. On the evidence, we are of the view that Mr. Rovers could not possibly be expected to be financially responsible in the conduct of this business.

The number of criminal convictions, the number of Highway Traffic Act offences, the false answers given to the Registrar and the fact that Mr. Rovers is on probation until June 7th, 1989, all militate against the registration of the Applicant and bring us within the decision of the case of Richard G. Brenner in which the Divisional Court held that the Tribunal should only refuse "to direct the Registrar to carry out (the Registrar's) Proposal if it thought the Registrar was in error in concluding that the past conduct of

the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty."

There are men who continually invite trouble from others. Rovers is not one of those. There are men who invite trouble from themselves and the invitation seems to follow them everywhere. Our observation of Mr. Rovers is that he is not a man imbued with criminal intent; he simply cannot seem to avoid the difficulties in which he constantly finds himself. To grant registration to Mr. Rovers would, in our view, be a disservice to the public, but it would also be unquestionably a greater disservice to him.

We note Mr. Rovers holds a Motor Mechanic's Certificate and assume from his evidence that he is an accomplished tradesman. He can in the meantime work at that trade while he is on probation. It has been held in previous cases that it is inappropriate for an Applicant to be registered while he is on parole or probation, being inconsistent with the intent of the Act. We are of that opinion in the matter before us.

It is, therefore, not for one but for the several reasons above and their cumulative effect, that we find the Registrar's Proposal should be sustained.

Accordingly by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

FREDERICK C. SHADWELL
(QUALITY MOTORS)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
GORDON R. DRYDEN, Member
J.T. HOGAN, Member

APPEARANCES: D. BOURGEOIS, representing the
Registrar of Motor Vehicle Dealers & Salesmen

No one appearing for the Applicant

DATE OF HEARING: 25 October 1989 Toronto

REASONS FOR DECISION AND ORDER

The hearing this morning deals with a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen pursuant to Section 7(1) of the Motor Vehicle Dealers Act, to revoke the registration of Frederick C. Shadwell, carrying on business as Quality Motors, as a motor vehicle dealer. Mr. Shadwell has not been represented this morning and the evidence from the Deputy Registrar, Mr. Robert Pierce is that Mr. Shadwell was registered on June 20th, 1988 as a motor vehicle dealer.

The requirements under the Motor Vehicle Dealers Act include that of ensuring that there is a location at which by office and sign, the public will know that a registered motor vehicle dealer is carrying on business. It is also the location where the books of the dealership are to be kept so that they are available for inspection and maintenance by anyone from the Registrar's office. It would appear as a result of the attendance at the business location which is said to be at R.R. #1, Lot 8, Concession 4, Lamarche Township, Cochrane, that in fact Mr. Shadwell does not maintain an office at that address; that there are no motor vehicles being offered for sale there, and there is no sign identifying the registrant prominently displayed to the public.

The evidence that is before this Tribunal confirms that observation and, accordingly, by virtue of the authority vested in it under Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

MR. AND MRS. SEAFORD TYE

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
OF THE MOTOR VEHICLE DEALERS' COMPENSATION FUND
FOR A REFUND OF MONIES

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
J.T. HOGAN, Member

APPEARANCES:

MARK S. GROSSMAN, representing the Applicants

L.A. BANACK, representing the Board of Trustees
of the Motor Vehicle Dealers' Compensation Fund

DATE OF

HEARING: 7 March 1989

Waterloo

REASONS FOR DECISION AND ORDER

On September 2nd, 1986 the Applicant, Seaford Clifford Tye attended at the premises of Eastside Mack in Pickering with the intention of purchasing a Mack tractor truck. Tye was a truck driver operating between Winnipeg and Toronto and his 1977 Freight Liner was in poor condition. He had no intention of trading it, but simply wished to purchase a newer vehicle.

At Eastside Mack, he met a salesman identified as one "Brian" who quoted him a price of \$86,711.00 for a truck which was almost new. Tye's response was that he would buy the truck if it could be financed. The salesman asked for a deposit of \$1,000.00 and undertook to try to obtain the required financing for the truck Tye had agreed to purchase. The cheque for the deposit (Exhibit 8) was dated September 2nd, 1986 and deposited to the credit of Eastside Mack on September 16th, 1986.

Sometime later, Tye received a call from the salesman advising him that the truck might be financed through Kingchurch Motors of 1 Kingston Road, Pickering, and as a result he attended there to discuss the matter with one Brian Kenney. Kenney told him his payments to finance the vehicle would be approximately \$1,900.00 monthly and Tye appears to have been satisfied with this arrangement. He then tendered a cheque to Kingchurch Motors for \$12,500.00 and sometime later took possession of the vehicle. The receipt for the contemplated purchase (Exhibit 11) is dated September 24th,

1986. He had signed no documents with either Eastside Mack or Kingchurch Motors and from this point on had no knowledge of the backroom dealings among Eastside Mack, Kingchurch Motors and Gorrie's Leasing Corporation, the latter of which then came into the picture.

Expecting to buy the vehicle, Tye then signed a lease with Gorrie's National Leasing, the document perhaps being incomplete at the time of execution. The Applicant does not know whether or not it was complete. It is clear, however, from his evidence and that of his wife, that he was unaware of the terms of the lease and, even that it was a lease. They received a copy of the lease from Gorries sometime later, perhaps in October, but until then knew nothing of his obligation to Gorries or the capital cost of the vehicle.

The lease bears two dates, September 22nd and October 8th, 1986. It reflects the following transactions: Kingchurch Motors Limited purchased the vehicle from Eastside Mack for \$128,963.00 less a discount of \$38,963.00. The balance due to Eastside is shown as \$90,000.00. The date of this purchase is September 15th, 1986 and the vehicle involved is the same one on which Tye had given the \$1,000.00 deposit to Eastside Mack on September 2nd, 1986.

Kingchurch then sold the truck to Gorries Leasing Limited for \$92,000.00 on September 25th, 1986 keeping \$10,000.00 of Tye's deposit of \$12,500.00, leaving a balance of \$82,000.00. Gorries then leased the vehicle to Tye showing a capital cost reduction of \$10,000.00 and providing for payments of \$1,945.00 monthly over a term of 48 months.

Tye knew nothing of this arrangement among the three auto dealers until he received his lease in the mail and Mrs. Tye called Gorries to ascertain what had happened to the \$1,000.00 paid to Eastside and the extra \$2,500.00 paid to Kingchurch. She was advised that \$1,505.81 was pro rated and applied to the first month's lease payment and the balance was a brokerage fee charged by Kingchurch. Gorries could not account for the \$1,000.00 paid to Eastside Mack. Tye then returned to Eastside Mack to find the dealership had closed and was out of business. As a result, he did not recover his \$1,000.00 and that now forms the basis of his claim against the Compensation Fund.

It is unfortunate that we can find nothing commendable in the conduct of those involved in this conspiracy to take advantage of an unwitting and naive truck driver. One wonders

how the simple purchase of a truck could become so complicated, nor would it if everyone concerned had not wanted his hand in Mr. Tye's pocket. He thought he was paying \$86,711.00 to purchase the vehicle, but instead he leased it at a price of \$90,000.00. He believed he had paid \$13,500.00 down as a deposit on it, but learned later he had leased it and paid \$10,000.00 towards the lease. Eastside Mack retained his \$1,000.00 deposit and then closed its business.

The whole transaction does nothing to enhance the public's perception of the automobile industry.

But what of this man's claim to compensation? It would appear on the face of it that he should be entitled to be reimbursed from the Fund. There are, however, statutory requirements which must be satisfied. These have not been advanced by the members of the Compensation Fund in considering and eventually dismissing his claim. The decision conveyed to Mr. Tye in a letter from the Chairman of the Motor Vehicle Dealers' Compensation Fund dated November 22nd, 1988, is quoted in part:

Accordingly, as there was no record of a sales contract between yourself and Eastside Mack submitted as part of your application, the Board of Trustees found your claim not to be a proper claim and voted to deny any payment. This letter serves to confirm notice of that decision.

The reason given appears to be based on the Applicant's failure to deliver to the Board the sales contract between him and Eastside Mack. There was, however, no written contract and since it is the dealer who invariably provides the contract, Mr. Tye can hardly be expected to produce it. In this cute game, the dealer obviously wanted no contract between them. We, therefore, do not consider this a sufficient reason to deny the claim, particularly since his statutory declaration could outline the circumstances of the transaction and his cheque was evidence of his deposit.

There are, however, other factors which militate against the application. Mr. Tye was asked by the Board to obtain a judgment against Eastside Mack in its letter of June 30th, 1988, which I quote:

Your client's claim against the Motor Vehicle Dealers Compensation Fund was

considered by the Fund's Board of Trustees at their June 22, 1988 meeting.

The Board has requested that Mr. Tye obtain a judgment against Eastside Mack for the amount owing to him relative to his deposit of \$1,000.00 on the purchase of a truck. Along with the judgment, the Board now requires from all claimants an affidavit setting out the particulars of the transaction and providing copies of all documentation relative to the transaction. The affidavit must be properly sworn to by the client.

Unhappily, Mr. Tye did not do so. His counsel pointed out that the issue of jurisdiction made it difficult and also that possibly Eastside Mack could not be served. We note, however, that Eastside Mack was operated by two numbered companies 428619 and 428620 in partnership and the principals appear to be David Campbell and O. McMillan with the head office at 77 Orchard Road, Pickering. In any event, the evidence is that Mr. Tye took no action in the Small Claims Court to obtain his judgment.

Mr. Banack, counsel for the Board, has submitted that the claim must fail because the Compensation Fund does not cover leased vehicles. We reject that argument because Tye both intended to and thought he had bought a vehicle and was inveigled into the lease by nothing short of chicanery. To allow that defence would simply be a condonation of deceit.

Section 12 of Regulation 665 of the Motor Vehicle Dealers Act, R.S.O. 1980, Chapter 299 provides in subsection (2) and (3) for the claim to compensation and reads as follows:

(2) On and after the 1st day of October, 1986, a customer may make a claim against the Fund where the claim meets one of the requirements set out in subsection (3), notwithstanding that the motor vehicle dealer with respect to whom the claim is being made is not a participant.

(3) A customer may make a claim against the Fund where he gives written notice of the claim to the Registrar within two years of the participants' refusal or

failure to pay, notwithstanding that the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as taxed.
2. The participant has been convicted of an offence under the Criminal Code (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the conviction and of the correctness of the liquidated amount.
3. The participant has become a bankrupt or a winding-up order has been made or a receiver appointed in respect of the business of the participant under the Bankruptcy Act (Canada) and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the allowance of the claim by the Trustee in bankruptcy, liquidator or receiver, less any amount that may have been paid on account of the claim by the Trustee, liquidator or receiver.

4. The customer has made payment by way of deposit, down payment or otherwise to a participant with respect to an undelivered motor vehicle and the customer has not received the motor vehicle contracted for or an alternative motor vehicle that is acceptable to the customer and the claim is for a refund of the payment made to the participant where the customer has made a demand for payment from the participant and the participant has refused without legal justification to make the payment or is unable to pay by reason of bankruptcy or insolvency, but is not a claim for a refund of money paid by the customer to a participant where the customer has been provided with the motor vehicle contracted for and the demand for a refund is based on the cost, value or quality of the vehicle provided.
5. The customer has made payment for an extended warranty or service plan to a participant where the warranty or plan is not underwritten by an insurer and the term of the warranty or plan has not expired and the claim is for a non-earned premium or for a repair under the warranty or plan.

Subsection (3) permits a claim to be made by written notice to the Registrar within two years of the refusal or failure to pay. Mr. Tye has complied with this part of the Regulation, but it continues "and where the claim meets one of the following requirements".

The first is a judgment in any court in Ontario. Although invited by the Board to begin an action in the Small Claims Court, in their correspondence of June 30th, 1988 to Mr. Tye's counsel, the Applicant took no action; he, therefore, cannot satisfy subsection 3(1).

The second requirement is evidence of a conviction against the participant under the Criminal Code for fraud,

theft or false pretences in connection with the transaction. There has been no evidence produced before the Board or this Tribunal of any convictions relative to the transaction.

The third requisite is evidence of a bankruptcy or receivership by the participant. No evidence has been adduced to prove either an assignment in bankruptcy or a receivership.

The fourth condition is proof that the customer made a deposit or down payment to the dealer with respect to an undelivered vehicle or an alternative thereof. There is undisputed evidence that Mr. Tye made his down payment in the sum of \$1,000.00, but there is also evidence that he received his vehicle as a result of which he does not qualify under this section.

The fifth requisite does not apply to the subject transaction and is, therefore, not relevant to this decision.

We are left, therefore, to the conclusion that the Applicant cannot qualify for compensation having failed to satisfy the requirements prescribed by the Regulations. We sympathize with the Applicant and view the whole transaction with the distaste it deserves. Unfortunately, however, he has failed to meet the conditions which the legislation demands and we are, therefore, bound to deny the claim.

Accordingly, by virtue of the authority vested in it under Section 15(1) of Regulation 665 of the the Motor Vehicle Dealers Act, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim.

HARRY P. ALEXANDER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
D.H. MacFARLANE, Member

APPEARANCES:

HARRY P. ALEXANDER, appearing on his own behalf

CAROL A. STREET, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 12 May 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Harry Alexander from the decision of the Ontario New Home Warranty Program disallowing his claim for the replacement of an ensuite shower which he alleges does not drain properly.

The home, located at 15 Hime Crescent, Ottawa, was built by Richcraft Quality Home Builders and Alexander took possession on approximately November 15th, 1987. The Certificate of Possession was not entered in evidence but the parties seem to be agreed on the date of possession.

Mr. Alexander brings his claim under Section 13.1 (a)(i) of the Ontario New Home Warranties Plan Act and it is conceded that the claim has been made within the time prescribed by the Act. It is also conceded by the parties that the only issue remaining is the defective shower and that is the sole matter with which this Tribunal will be concerned.

Mr. Alexander's complaint arises from what he terms as improper and insufficient draining of the water from the shower base resulting in ponding of the water which has not drained. He points out it is a hazard since one entering the shower is in danger of slipping on the floor. He is concerned for both his family and any guests who may use the shower. As a result, he complained to the builder's representative, a Mr. Peter Andrews,

who said the company would fix it. It appears the base of the shower was then replaced by the builder, but the second one has not alleviated or improved the situation. Mr. Alexander says the shower base does not slope properly to the drain thereby leaving the floor slippery.

On June 2nd, 1988, the Program's Conciliation Officer, a Mr. Paul Picard, attended at the premises and in his report of June 16th, 1988, makes the following observation:

The ensuite shower is a corner unit with glass sides and door with an acrylic base. The base is tilted forward and approximately 1/2 inch of water remains in the front half of the base when the shower is not in use. It is the Warranty Program's position that this may represent a slipping hazard as the water remains directly in front of the door. In any event, the intent of the base is to direct water to the drain, therefore, the situation is to be rectified.

The Program in its correspondence of August 29th, 1988, to the builder advised the company as follows:

Item #3. Ensuite shower; the manufacturer's representative will be requested to inspect the floor of the shower and advise us as to the rectification of the ponding of the water.

There followed on August 31st, 1988, a response from Metro Plumbing Supply, the distributor of these particular shower units, which we reproduce:

August 31, 1988

Richcraft Homes
148 Colonnade Road
Suite 202
Nepean, Ontario

Attention: Gord Long

Re: Shower Base D-17 Hime Crescent,
Howeowner: Harry Alexander

Dear Sir:

I have inspected the shower base (Showerlux Model SRA) at the above address and can confirm that the base is properly installed and that the water remaining in the base after usage is normal.

In order to remove all the water in a shower base of this type, the unit must be wiped down after each use. You can rest assured, however, that the residual water in no way affects the durability of the base.

I trust that this is the information you require.

Yours truly,

Adrien Pilon
Metro Plumbing Supply
Exclusive Showerlux Distributor Ottawa Area

The Program then wrote to Mr. Alexander offering an alternative solution to the problem which it strongly recommended. The letter is reproduced in part:

September 15, 1988

Mr. & Mrs. H. Alexander
15 Hime Crescent
Ottawa, Ontario

Dear Mr. Alexander:

Re: Your Shower Floor

I have been unable to contact you by telephone, thus this letter.

In my investigation I find that the manufacturer of the acrylic floor for your shower has stated to Mr. Marshall that there will always be a certain amount of water puddling on the shower floor. As we have discussed, your builder has agreed to install a non-slip material to the floor and confirmed to me that this would be completed by September 2, 1988. This installation was postponed as your insurance company advised that it was necessary that the floor completely drain itself of all standing water and that the application of the non-slip material was not the solution.

Our experience has been that most shower and tub floors do not completely drain but leave a certain amount of standing water.

Your shower floor has been replaced previously in an attempt to reduce the standing water; however, this was not successful. Our experience is that the non-slip application is successful and is widely used by homeowners and institutions.

I urge that you reconsider your decision not to take advantage of the non-slip solution.

Unfortunately, I have no alternative solution to offer and under the circumstance, I do not feel that the Program can be of further assistance to you with regard to your shower floor.

Alexander found this unacceptable and as a result brings this appeal.

Mr. Alexander was insured by State Farm under a liability policy and when he inquired of the Company the status of his insurance concerning any injury incurred in the use of the shower, the Company cancelled his policy. He advised the Program of this unilateral action and in his letter to the builder on August 29th, 1988, Mr. Else, Manager of Operations for the Program said:

You have agreed to finalize the shower problem as soon as possible due to the deletion of the homeowner insurance by his insurance company.

Since, however, nothing was done to alleviate this situation, Mr. Alexander, feeling aggrieved, has brought the matter before the Tribunal.

Mr. Else, testifying on behalf of the Program says he attended at the Alexander home in August of 1988, and after turning the shower on and off, found a patch of water 6 inches in diameter and 1/4 inch in depth in one area. There were also at least a half dozen "loonie-size pockets" remaining in the shower base. He observes that it is not unusual for water to remain thus, but made his recommendation of August 29th that the manufacturer's representative inspect it. He points out that this did not constitute a breach of the building code. He further observed that every tile has a safety hazard and most people put adhesive strips down. Asked about the cost of replacement, he estimated it to be approximately \$300-\$400.

Mr. Alexander has come from Ottawa to represent himself on a matter, the cost of which may be de minimus, but the implications of which are to him most important. He is honest and sincere in his testimony but he is also embittered and frustrated, angered by what he considers to be the insensitivity of a bureaucracy. We accept his evidence that the shower base does not drain properly and constitutes a hazard to anyone using it. We find on the evidence that the fault lies with the slope and contours of the base. It is, therefore, clear that there has been a breach of Section 13.1(a)(i) in that the unit is not free from defects.

We do not believe it would be of advantage either to the appellant or the Program that an order go requiring the builder to replace the facility. We are instead of the view that Mr. Alexander should be compensated by the program in order that he may replace the unit to his own satisfaction and we set that compensation at the sum of \$500.00.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicant's claim in the sum of \$500.00.

MR. AND MRS. A. AXIAK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
LOUIS A. RICE, Member

APPEARANCES:

MARIO ZAMMIT, representing the Applicants

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 3 October 1989

Toronto

REASONS FOR DECISION AND ORDER

The Applicants purchased their new home from Montana Construction pursuant to an Agreement of Purchase and Sale that provided, inter alia, that "the vendor agrees to stain and varnish all parquet floors and circular stairs". The house had already been constructed, but was not completely finished at the time the Applicants signed the agreement.

Prior to their closing date, the Applicants, accompanied by at least one other person, as well as by Mr. Montana, carried out an inspection of the home. Mrs. Axiak testified that she and her husband were "rushed through" the inspection. Mr. Montana, on the other hand, testified that a thorough inspection was carried out by the purchasers, taking some one and one-half to two hours to complete.

Both Mr. Montana and Mrs. Axiak are in agreement, however, in their testimony that the only matter raised by the Applicants on the inspection date was in respect to the colour difference between the circular stairs and the second storey parquet floor. The Applicants complained that the parquet floor had been stained a dark walnut colour, while the stairs were a lighter "natural" colour. The evidence clearly indicates that Mr. Montana told the Applicants, on the inspection date, that the colour difference was unavoidable since two different types of wood were involved.

Mrs. Axiak wanted to have her complaint regarding the staircase colour noted on the Certificate of Completion and Possession. However, Mr. Montana persuaded the Applicants that this was not necessary. As a result, this item was not listed on the Certificate. The evidence of both Mrs. Axiak and Mr. Montana also makes it clear that no other items of complaint were identified by the Applicants on the date of the inspection. The Certificate of Completion and Possession listed no defects whatsoever and stated "nil". Mrs. Axiak stressed in her evidence that Mr. Montana had, at the time, assured the purchasers that if they did find any defects he would fix them.

After the Applicants took possession, they made additional complaints to the builder about a number of other items, and well within the first year warranty period, took all of their unresolved complaints to the Ontario New Home Warranty Program (the "Program"). As a result of the Program's inspection and conciliation efforts, all but two areas of complaint were resolved and it is with respect to these two areas that this Tribunal is now concerned.

The first complaint relates to the colour variation between the circular stairs and the parquet floor on the second floor landing. There is undoubtedly a difference in colour as may be seen from the photographs filed as exhibits in this proceeding. The fact that the Certificate of Possession and Completion did not set forth this complaint is irrelevant since there is no question that the colour variation was present when the Applicants took possession of the home.

The only issue with respect to this claim is whether or not it is an item that would be covered at all under the statutory warranty.

Counsel for the Applicants argued that the colour variation would be covered under Section 13(1)(a)(i) of the Act, in that the work was not carried out in a workmanlike manner. There was evidence from the floor installer before the Tribunal indicating that the staircase had received only one coat of stain while the parquet floor received two coats of stain.

Mr. Montana took issue with the evidence of his own installer and continued to maintain that the colour difference was unavoidable since the staircase was solid oak and would not absorb a darker stain no matter how many coats were applied.

The Applicants, unfortunately, called no expert evidence to prove that additional coats of stain would have made a

difference; the onus, of course, being upon applicants to prove their claim. Even assuming for the moment that the colours could have been matched, does the failure to match the staircase to the second floor parquet amount to a failure to complete "in a workmanlike manner?" Or is it simply a matter of personal taste and aesthetics?

In the case of Bel M. de Pinho reported in 1988 C.R.A.T. Summaries of Decisions (Volume 17) at p. 110, the builder had installed a circular staircase and different sections of the railing were a different colour from the rest of the railing. The Tribunal held that the builder had an obligation to match the woods involved in the construction of the handrail and that the handrail as installed, although not unsightly, was "not to be expected in a reasonably expensive house". (We were advised by counsel for the Program that the de Pinho decision is currently under appeal.)

In the case of Robert J. Bohan, reported at 1987 C.R.A.T. Summaries of Decisions (Volume 17) p. 138, the brickwork had numerous aesthetic defects, although the functioning of the walls was not affected thereby. The Tribunal found that, cumulatively, the defects created a significantly negative effect on the appearance of the home. The Tribunal held that the overall workmanship fell below the standard that could reasonably be expected by a purchaser of a new home.

In the case before us, the colour variation is not between different sections of the staircase, but relates to the failure to match the staircase to the adjacent parquet floor. The second story parquet floor is not visible from the main level according to the evidence of the Program inspector. The colour variation between the two components cannot be said to be unsightly or to impact negatively on the appearance of the home in any significant way. Indeed, the Tribunal would be hard pressed to find, on an objective basis, that there is any negative impact at all. The onus is on the Applicants to satisfy the Tribunal that this complaint falls within the ambit of the statutory warranty and the Tribunal has not been so satisfied. Accordingly, the claim will be disallowed.

The second claim relates to scratches on the arborite kitchen and bathroom counter tops. With respect to this complaint, the issue is whether the counter tops were scratched before or after the Applicants took possession of their home. With respect to this item, the evidence relating to the pre-closing inspection is relevant.

Mr. Montana testified that the Applicants inspected the counters. He denies that the counters were scratched when the purchasers took possession. The evidence of both Mrs. Axiak and Mr. Montana, (as well as the Certificate of Completion and Possession itself) indicates that clearly no complaint about the counter tops was registered by the Applicants on the date of inspection.

The purpose of the pre-closing inspection is precisely to ferret out such surface defects. In this instance, each party places responsibility on the other for causing the scratches. The Program found that it could not assign responsibility. The Tribunal finds, that based upon the evidence that has been put before it, it is unable to conclude, on a balance of probabilities that the scratches were present when the Applicants took possession. Accordingly this claim too is disallowed.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.

B.H. CHIP BOWNESS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
STEPHEN PUSTIL, Member

APPEARANCES:

LT. COL. B.H. CHIP BOWNESS, appearing on his own behalf
CAROL A. STREET, representing the Ontario
New Home Warranty Program

DATE OF
HEARING: 28 September 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Lt. Col. B.H. Chip Bowness from the decision of the Ontario New Home Warranty Program of March 17th, 1989, disallowing his claim for damages as the result of the failure of a steel beam beneath his fireplace causing the hearth to drop which in turn caused the brick facing of the fireplace to separate from the wall.

The home at 6255 Fortune Drive, Orleans, Ontario was purchased by the Applicant in July of 1981. The first owner had apparently built the house in 1977 and the five year warranty for structural defect would have expired in 1982. Bowness, however, had filed a claim with the Program on October 20th, 1981, in which he alleged the chimney structure had developed a 1" gap between it and the wall, and he was concerned about it leading to a more serious problem.

On March 11th, 1982, the Program's inspector reported on his findings:

chimney facing separating from the wall in
the family room.

Observation:

The fireplace construction is as follows brick face with a brick hearth, a metal liner with an exterior brick chimney and a concrete slab beneath the fireplace assembly.

A gap (approx 3/8th") was visible between the wall & brick facing. The face can be moved either by applying pressure to the face or inserting your fingers in the gap & pulling. It appears the face hasn't been secured by ties.

No cracks were visible in the brick face, the chimney, or the foundation.

Comment:

The face of the fireplace has no load-bearing function, it is just for aesthetic purposes. By keeping with the definition of a MSD, no MSD exists in this case but corrective action should be taken by the owner to secure the face.

As a result, on March 16th, 1982 the Program advised Lt. Col. Bowness that it could not assist him in his claim and his claim was disallowed because there was no evidence of a structural defect.

A letter of March 16th to Mr. Bowness is as follows:

A review of your claim for Major Structural Defects has now been completed following an inspection of your home on March 11, 1982.

The existing brick facing on the interior of the fireplace is separating from the wall behind by approximately 3/8". The brick facing moves if pressure is applied against it. No abnormalities were visible on the brick hearth, the metal fireplace liner, the concrete slab beneath the fireplace assembly and on the exterior of the chimney.

It is the Decision of the Program that, in keeping with the definition of a Major Structural Defect, (as shown on the reverse side of your Warranty Certificate) a Major Structural Defect does not exist.

The brick facing of a fireplace has no load-bearing function. It is a finishing cladding of the fireplace, as much as siding is a finishing cladding of the exterior wall. The securing of the brick facing to the wall behind can be obtained by removal of some bricks in a few locations and by providing brick ties, before the reinstallation of the removed bricks.

Col. Bowness decided not to appeal this decision because, as he says, it meant he would have to tear out the wall behind the fireplace in order to prove his claim. The matter thus ended.

In 1988, however, the steel angled section supporting the hearth gave way under the weight of the concrete and brick and the brick facing of the fireplace separated even more from the wall. The cause of the failure of the support appears to have been the fact that the 4 x 6 steel angle was resting only on about 1/4" of concrete at one end. This eventually became insufficient to maintain the load causing the collapse of the hearth above. It must be remembered that this house had been built, eleven years before in 1977.

Col. Bowness again filed a claim with the Program in which he alleged the major structural defect had previously been pointed out, but the claim in 1982 had been denied. It was, in his opinion, because the facade of the fireplace had not been tied to the wall that the catastrophe occurred. The following findings of an engineering firm retained by him were submitted in evidence:

The following components showed evidence of failure:

- a) A single supporting 2 x 8 joist which was unrestrained at one end and attached with a joist hanger at the other had dropped about 3/8 inch at the restrained end and had twisted under the load of the

fireplace brick and hearth and had permitted the hearth to drop.

- b) A supporting 4 x 6 steel angle was bearing only about 1/4" on concrete at one end. The angle had also twisted to permit the hearth to drop.
- c) The dropping of the hearth had allowed the brick facing to pull away from the wall some (1) inch at the ceiling prior to removal.

There was no method of anchorage of the facing brick to the wall.

- 3. Evidence of smoke staining and scorching of the gyproc paper behind the brick facing was evident.

Having no choice but to make the necessary repairs, the Applicant immediately hired Accu-K Contractors of Ottawa to do the following work which he paid for on that date:

Remove existing brick fireplace	\$500.00
Obtain engineers report	280.00
Disconnect water, gas and exhaust pipes	480.00
Supply heaters for one night	180.00
Remove existing structural support)
Install 6" I beam and 2 jack posts	) 1,200.00
Reinforce floor joist around I beam)
Strap and re-insulate foundation walls	180.00
Rebuild hearth and fireplace	900.00
Install new mantel	280.00
Install new doors	420.00
Repair ceiling and paint living room	180.00
Steam clean carpets	100.00
<hr/>	
Total	\$4,700.00

The New Home Warranty Program in a letter of March 17th, 1989 to Col. Bowness disallowed the claim for the following reasons:

This claim is based on a letter received January 16, 1989 from the homeowner, which included a report from CSA Building Sciences Limited, Ottawa, consulting engineers, dated November, 1988.

The basis of this claim originates from a previous Major Structural Defect decision made on March 16, 1982. In that decision, a Major Structural Defect was denied and the homeowner did not appeal.

The claim was based on the interior brick facing of the fireplace separating from the wall behind it by approximately 3/8 in. As this brick facing has no load bearing function the claim was denied. Advice was offered in the decision if the homeowner desired to secure the facing to the wall.

This involved the removal of bricks, the installation of brick ties and the restoration of the removed bricks.

The homeowner's engineering report (CSA Building Sciences Limited) documents an inspection undertaken on November 9, 1988. Prior to inspection a contractor had removed the brick facing from floor to ceiling, provided a telepost below a 2 x 8 joist disconnected the gasline and removed the hot water tank to permit access for repairs. The report then states "the supporting structure beneath the fireplace had failed to the extent that the hearth had dropped some one (1) inch at the edge away from the wall." The report indicated evidence of failure being a) a 2 by 8 joist was unrestrained at one end and the joist hanger at the opposite end, had dropped approximately 3/8 in. at the unrestrained end, twisted under load (fireplace) and allowed the hearth to drop; b) a 4 x 6 steel angle had only 1/4" bearing at one end and had also twisted allowing the hearth to drop; c) the

dropping of the hearth had allowed the brick facing to separate the wall by approximately one (1) inch at the ceiling (as advised by contractor and tenant).

Note: There was no evidence of brick ties behind the brick facing as advised by the Program in March, 1982.

The report concludes by stating the "noted failures occurred primarily as a result of inadequate capacity, bearing and/or bracing of the supporting structure in the original construction."

Repairs were then reportedly completed by the contractor, and now the homeowner has requested review for reimbursement. No invoice was enclosed with the homeowner's documentation.

This home is now over eleven (11) years old, with the repair work having been completed in the eleventh year. The five year warranty on this home expired on November 10, 1982, and no Major Structural Defect was demonstrated within that time. As the Warranty Program does not warrant potential claims, or after the warranty expiry, this claim must be denied.

The question before this Tribunal is simply whether or not there is evidence of a previous and continuing structural defect sufficient for us to allow a claim six years after the warranty expired and even if there is, can the claim be honoured?

The answer to the first question must be "no" since there was no evidence of a structural defect at the time the first claim was filed and, if there was at the time of the second claim, what was it? The probability according to the evidence is that the angle beam resting on approximately 1/4" of concrete eventually collapsed because of a shrinking of the concrete eleven years after construction. No other reasons have been put before us and the fact the facade was not tied to the wall had no bearing on the result.

The answer to the second question is found in the legislation and, particularly, Section 14(1)(c) of the Act which provides as follows:

14.-(1) Where,

- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

We are dealing with a claim now made six years after the warranty expired. This Tribunal is bound by the statutes under which it operates and has no power to extend or alter the statutory requirements embodied in the subject act. The answer, therefore, to the second question must also be "no".

This is a very unfortunate case, particularly in view of the fact, that we cannot give the Applicant the relief he has requested. There are, of course, other avenues open to him which may provide the desired result were he to seek the benefit of legal advice.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

GARY CIAMPAGLIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:
GARY CIAMPAGLIA, appearing on his own behalf
CAROL A. STREET, representing the Ontario
New Home Warranty Program

DATE OF HEARING: 27 October 1989 Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Gary Ciampaglia appeals to this Tribunal from a decision of the Ontario New Home Warranty Program disallowing his claim for repairs to the ceilings in his front hall, family room and master bedroom.

He had originally claimed against the Program for repairs to the damper in his fireplace and squeaks present in some of the floors. He has, however, abandoned these claims and the Tribunal will deal only with the alleged defective workmanship in the ceilings.

Ciampaglia took possession of the property on September 23rd, 1987, and it is acknowledged by counsel for the Program that the complaint was filed within the first year. The only issue, therefore, being whether or not the workmanship was defective.

The ceilings in the subject rooms have had stucco applied which leaves a fairly rough surface such as stippling, but Mr. Ciampaglia maintains the effect is to create the appearance of waves across the ceiling particularly in the master bedroom. He points out that when he lies in bed at night and looks at the ceiling, the waves are so pronounced with the lights on, "that it is driving him crazy".

Apparently the southwest bedroom is also not acceptable, but the Program has undertaken to make the necessary repairs to it. There are approximately four joynes in the master bedroom, each of which causes the appearance of a wave or undulation in the ceiling and is, of course, more apparent under electric light than in the daylight.

Although the same effect obtains in the hall and family room, it appears that the master bedroom is the most troubling to the Applicant and clearly a continuing eyesore. Mr. John Moffitt, an inspector with the Program, attended at the premises on February 22nd, 1989 and his report of March 17th, 1989 in reference to the complaint of "waves on drywall in ceiling" is as follows:

Observation: The finish of the drywall ceiling tape joints is not acceptable in the following locations:
 (a) the ceiling of the southwest bedroom
 (b) the ceiling of the dining room/living room across the centre of the room and where the dining room meets the living room.

The Program has attended to the dining/living room and undertaken to complete the southwest bedroom.

Mr. Moffitt, however, says "the finish of the ceilings is acceptable and within average range of acceptability in the family room and master bedroom". He made no reference in his report to the downstairs hall.

In his evidence, Mr. Moffitt, corroborated his findings in his report and pointed out that under daylight conditions, one could see little or no undulation in the ceiling of the master bedroom, but at night some shadows were visible across the ceiling particularly because it was such a large room.

From our understanding of the construction of the house, it appears that the roof trusses would cross the master bedroom in the same manner as in the southwest bedroom and these have caused the uneven appearance of the ceiling. It is clear that the owner lying in bed at night is continually bothered by the state of the ceiling and it should, therefore, be repaired. We find as a fact the workmanship to be defective within the meaning of Section 13(1) of the Act, but must disallow the Applicant's claim for repairs to the ceilings of the hall and family room - there being no evidence of defective workmanship in these rooms.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to take the necessary action to repair the ceiling in the master bedroom.

MR. AND MRS. FRANK COLAVECCHIA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JOHN HURLBURT, Member

APPEARANCES:

CAROL A. STREET, representing the
Ontario New Home Warranty Program

No one appearing for the Applicants

DATE OF
HEARING: 15 September 1989

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal determines as follows:

1. This hearing was scheduled to take place today at 9:30 a.m., or so soon thereafter as the matter could be reached.
2. The Applicant appeared at 9:30 a.m. and was later advised that the hearing would commence at 10:30 a.m.
3. The Applicant left and did not return at 10:30 a.m.
4. The hearing proceeded at 10:45 a.m. in the Applicant's absence.
5. No evidence has been placed before the Tribunal in respect of the claim.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

CREDIT VALLEY CONTRACTING CORP.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MacFARLANE, Member

COUNSEL: R.J. ROGERS, its agent

BRIAN M. CAMPBELL, representing the Registrar
under the Ontario New Home Warranties Plan Act

DATE OF 25 January 1989

HEARING: 16 February 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar under the Ontario New Home Warranties Plan Act to revoke the registration of the Applicant, Credit Valley Contracting Corp. as a builder. The reason given by the Registrar for his Proposal is that the Applicant does not have sufficient technical competence to consistently perform the warranties mandated by the Ontario New Home Warranties Plan Act. The basis of this finding by the Registrar is the failure of the Applicant to properly construct and complete the home owned by Mr. and Mrs. Panacci.

The facts in this case were related by Mr. Panacci and corroborated by the other witnesses, including Mr. Rogers on behalf of the Applicant. The facts are as follows:

On October 21st, 1987, Mr. & Mrs. Panacci entered into a building agreement with Credit Valley Contracting Corp. whereby Credit Valley undertook to build an R-2000 home for them for the sum of \$152,500.

An R-2000 home is a super energy-efficient dwelling and, therefore, is far better insulated than the ordinary home. Under a program administered by a Department of the New Home Warranty Program, the R-2000 home design must be approved in advance and satisfy certain criteria with respect to materials and construction stipulated by the R-2000 Department.

Builders wishing to build R-2000 homes must take certain courses given by the Department. Once having done so, they are put on a list of acceptable builders.

Mr. Panacci testified that he obtained the Applicant's name from just such a list.

The Panaccis entered into a contract with Credit Valley and submitted blue prints for R-2000 approval. Construction began in early March 1987.

Initial problems between the builder and Mr. Panacci began when Credit Valley informed him that certain windows on the blue print were not available in the sizes indicated. As a result, smaller windows were used and Mr. Panacci never received the dining room window which Credit Valley promised.

During the months of February and March, 1988, Mr. Panacci noticed that Credit Valley was doing very little work on the house which at that stage was approximately 58% complete.

The problems between Credit Valley and Mr. Panacci came to a head in March when Mr. Panacci was asked to prepay the sum of \$30,000 which was only due upon completion of the exterior of the house. Up to that point, Mr. Panacci had paid the sum of \$97,000 as required under the contract, such payments having been made on a stages-of-construction basis.

Mr. Panacci refused to advance the sum of \$30,000 since it was not owing. He was then asked by Credit Valley to pay the sum of \$4,500 for other work asked for and still unpaid. Both parties agreed that a payment of \$1,500 would be made on account.

Before Credit Valley presented the cheque for payment, however, Mr. Panacci was approached by certain of Credit Valley's sub-contractors asking him to pay certain of their accounts which Credit Valley had not paid. When Mr. Panacci informed Credit Valley of these claims, they said they could not pay them because they did not have the money. Mr. Panacci, to protect the home from liens, paid at least \$5,000 to various of the creditors and also stopped payment on the cheque of \$1,500. He also had his lawyer send a letter dated March 15th, 1988, setting out the problems and deficiencies.

When Credit Valley received the letter, they left the work site, on approximately March 17th, and never returned.

Mr. Panacci had to undertake certain remedial work which Credit Valley had failed to do, as well as to have the house completed by others.

In the various reports by experts in insulation and architecture, as well as a report of Mr. Danny Relich of the Ontario Home Builders Association, Mr. Panacci was informed of the remedial work which had to be done on the 58% of the home which Credit Valley had completed. The reports cited problems with improper insulation, installing windows in a shoddy fashion, as well as in the wrong sizes, the failure to install baffles under the eaves, the installation of electrical outlets in outside walls without "poly boxes" around them which made it almost impossible to install a continuous air/vapour barrier, failure to properly assemble the rim joists in a manner which allowed for easy sealing of the joist area to permit a continuous air/vapour barrier, failure to properly shim the windows and doors which constituted improper insulation work, as well as certain other minor problems of a similar nature.

Mr. Panacci had to pay \$9,845.97 to correct all the above-mentioned defective work.

The next witness to testify was Mr. M.A. Keogh of Kan-Air Inc. Kan-Air specializes in the energy conservation of homes. It carried out work within the R-2000 program.

Mr. Keogh visited the Panacci home and issued a report on the remedial work to be done. He set out his findings in letters of April 12th and May 2nd, 1988 addressed to Mr. Panacci. One of the major problems was the unsatisfactory installation of the windows, as well as their sizes. In addition, the furnace was not installed in the location indicated on the plans and the wiring of the home was done incorrectly.

Mr. Keogh stated that the work would have been unsatisfactory in an ordinary home and not only an R-2000 home. He believed Credit Valley should have carried out the remedial work at its own cost.

While it was plain that Credit Valley had failed to repair work improperly done, it was also clear from the testimony of Mr. Keogh that the major part of the construction work was acceptable.

Mr. Relich of the Ontario New Home Warranty Program testified next. He was Assistant-Manager of the R-2000 office

when he visited the Panacci home and drafted a summary of the problems. He found that the home did not meet the R-2000 guidelines and that much remedial work was required. He tried to contact Credit Valley, but was unable to reach him.

The next witness was Mr. Vern Nelligan of the Ontario New Home Warranty Program. He visited the Panacci home on April 15th, 1988, and was able to perceive the same problems mentioned above. He authorized certain remedial work which fell within the New Home warranty and reimbursed Panacci for their payment.

Mr. Nelligan testified that he tried to telephone Mr. Rogers at Credit Valley, but that no one answered the telephone. Thereafter, he made no further attempt to contact Mr. Rogers either by phone or by writing; instead, he allowed the remedial work to be carried out without first giving Credit Valley the chance to do it at its expense.

When asked by the Tribunal whether the quality of work carried out by Credit Valley was so poor that it should not qualify as a registered builder, Mr. Nelligan said that Credit Valley was a "high risk", but could be registered subject to certain conditions.

Mr. Rogers testified on behalf of Credit Valley. He admitted that Mr. Panacci's home was the first he had ever built under the R-2000 program. He also admitted not having paid certain sub-contractors, but questioned whether Mr. Panacci should have paid them. He admitted leaving the work site permanently once he received the letter from Mr. Panacci's lawyer. He said that had he been notified by the Ontario New Home Warranty Program that certain work was to be remedied, he would have done so.

In argument, counsel for the Registrar under the Ontario New Home Warranties Plan Act, suggested that Credit Valley might be permitted to retain its registration subject to certain conditions.

The Tribunal finds that Credit Valley Contracting Corp. committed two serious breaches:

- 1) In the 58% of the construction which Credit Valley completed, it failed to carry out the work properly. Instead of doing the remedial work which it knew it was obliged to do, it chose to leave the job site.

- 2) Credit Valley abandoned the job site midway through construction rather than completing the contract which it had signed. Receiving a letter from the lawyer of Mr. Panacci was not grounds for Credit Valley to take this radical and unjustifiable step.

Having said this, the Tribunal is also aware that the construction job per se, while unsatisfactory, did not demonstrate that Credit Valley was unqualified to be a builder. The amount paid for repairs was a small fraction of the total construction cost. Builders, nevertheless, have the obligation to not only construct but to also carry out all remedial work necessary to deliver a home free of defects. This, Mr. Rogers and Credit Valley failed to do.

The Tribunal feels that it would be excessive to allow the registration of Credit Valley to be revoked; nevertheless, the public must also be protected against any future failure of Credit Valley to respect its warranty for construction work carried out. For this reason, the Tribunal will order that the registration of Credit Valley not be revoked, subject to the conditions proposed by counsel for the Ontario New Home Warranty Program.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar, Ontario New Home Warranty Program, to refrain from carrying out his Proposal, subject to the following conditions:

1. Credit Valley Contracting Corp. shall pay to the Ontario New Home Warranty Program the sum of \$7,760.34 by no later than April 20th, 1989;
2. Credit Valley Contracting Corp. shall give to the Ontario New Home Warranty Program an unconditional and irrevocable letter of credit of \$20,000 for each home to be built. This letter of credit shall be in favour of the Ontario New Home Warranty Program and shall be for a term ending one year after the taking of possession of the completed home;

3. There shall be three mandatory on-site inspections of each new home which Credit Valley Contracting Corp. builds; and
4. Credit Valley Contracting Corp. shall refrain from constructing any new homes until it satisfies the above conditions.

If Credit Valley Contracting Corp. fails to satisfy any of these conditions, the Tribunal directs the Registrar, Ontario New Home Warranty Program, to carry out his Proposal.

GERARDO DI MARTINO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
ALBERT LONGO, Member

APPEARANCES:

GERARDO DI MARTINO, appearing on his own behalf

STEPHEN P. MARTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 September 1989

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Gerardo Di Martino, purchased a new home at 7835 Tad Street, Niagara Falls, built by Pinewood Homes (Niagara) Ltd. and took possession on August 8th, 1986.

Although there appear to have been several problems arising from the construction of the dwelling, all but one of them has apparently been addressed by either the Ontario New Home Warranty Program or the builder in a manner satisfactory to all parties.

There has, however, been one continuing complaint still unresolved, and it forms the basis of Mr. Di Martino's appeal to this Tribunal.

In the family room, Mr. Di Martino had installed a Napoleon Woodstove which was then connected to the chimney. From the first time the stove was lit, it smoked, giving the appearance of the smoke coming down instead of up the chimney. This situation continued and was repeated whenever the stove was burning. Mr. Di Martino complained to the Ontario New Home Warranty Program and filed his Proof of Claim on July 13th, 1988 which contained, inter alia, the following:

chimney emits flames and excessive smoke

He had, however, advised the Program of this complaint in correspondence dated the 16th day of May, 1988:

As of December 1987 - The Family Room - we had found out that in the winter months when we used our wood burning stove that smoke would come down instead of pulling up the chimney. We soon found that the chimney clay pipe was installed incorrectly and not sealed properly with cement. This caused the smoke to leak through the pipe and down the inside of the stove. We also have water leaking from the brick wall of the chimney onto the floor of the family room. This happens when it rains/snows and is damaging our finished room with ceramic floor.

Mr. A. Richters, on behalf of the Program, inspected the chimney on October 17th, 1988 and in his letter to the builder dated November 8th, 1988 pointed out that:

Item #1 does present a serious problem as a Major Structural Defect in that it renders the home unfit for the use for which it was intended. Continued use of the fireplace presents a safety hazard, in addition to which your installation of a 5" chimney does not comply with the manufacturer's instructions nor with the Ontario Building Code.

Please take notice that you are required to correct the defect in the chimney and your corrective work must comply with the Ontario Building Code. You are to contact the owner within 15 days of receipt of this notice to make arrangements for such remedial work.

.....

The builder's representative then asked Wolf Steel Ltd. for its advice on their Napoleon Woodstove in the event the problem lay with the stove and not the chimney. A Mr. Fuller of that firm replied as follows in a letter of December 15th, 1988:

With reference to our phone conversation today, I would recommend your client to burn their stove much hotter and avoid green/wet wood to control the creosote buildup problem.

The matter of 5" chimney liner being connected to a 6" stove collar is a preferred application and is widely installed everywhere.

.....

The Program then employed Ontario Woodheat Leaders to install a stainless steel liner in the chimney and a cleanout door as required by the city by-law. A Mr. Brian Yanick who attended to complete the work, gave evidence that although he intended to install a 6" liner, the clay liners in the chimney were not sealed together and were offset to the point, it was impossible to install the 6" steel liner. There was liquid and third degree creosote in the chimney flue, some of which was leaking through the bricks to the outside of the chimney. He installed a 5" liner, together with an exterior cleanout door, packing the cleanout with insulation to prevent cold air infiltration around the 5" liner.

Having been called to inspect the chimney again on March 3rd, 1989, he concluded the chimney was simply unsafe to use. It was coated with third degree creosote thereby reducing the draft, the insulation had been removed from the cleanout and the liner and flashing had been shaken loose, as well as the lining having been punctured approximately 15 feet from the top. As a result of his findings, Mr. Di Martino simply tore the chimney down and built a new one.

It is our view that despite the alleged failure of the Applicant to have the stove burning sufficiently hot to avoid a large build-up of creosote, there was a major structural defect in this chimney. It is obvious the tiles were loose and ill-fitting permitting the smoke to filter through the bricks to the outside. This has not been a sudden or isolated complaint, but one continuing since the Applicant took possession of the property.

We, therefore, find that it is a major structural defect within the meaning of Section 14(1)(c) of the Ontario New Home Warranties Plan Act.

In his evidence, Mr. Di Martino said he and a friend of his had built the new chimney. There was no claim for labour, but he had paid \$8.63 and \$379.88 for materials. We, therefore, assess his damages in that amount.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay Mr. Di Martino the sum of \$388.51 in full satisfaction of this claim.

TO DISALLOW A CLAIM

APPEARANCES:

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 March 1989

Waterloo

REASONS FOR DECISION AND ORDER

This is an appeal by Murray Fischer from a decision of the Ontario New Home Warranty Program dated October 7th, 1988 which disallowed his claim for any further work by the Program.

Mr. Fischer received his Certificate of Completion and Possession from the Program on June 1st, 1987, at which time he took possession of the premises. Although work on the house had been largely completed, there were still some thirty-five complaints to be addressed and these appear on the Certificate. By September 1988, after conciliation, it appears that only five items were in issue and these form the subject of this appeal.

Throughout the hearing, however, representations were made that the Program and the Builder would attempt to resolve four of the complaints, all of which were of a minor nature leaving only one which the Tribunal has now addressed.

Mr. Fischer in his letter to the Program of April 4th, 1988, enclosed the following complaint:

- | | |
|--------|---|
| Item 1 | Noisy Floors - All wood floors are snapping, and cracking - vinyl flooring lifting. |
| Item 2 | First washroom
Noisy floors |

The same complaint was contained in the Certificate of Completion dated the 1st day of June, 1987:

"Kitchen floors noisy"

On September 26th, 1988, the Applicant reiterated the complaint in correspondence to the Program after he had received the Conciliation Report which said:

Item 3 "Noisy Floors and stairs: no excessive movement or noise noted at kitchen, bathroom, dining area or stairs."

On October 7th, 1988, the Program wrote to Mr. Fischer disallowing his claim for the following reasons:

Your letter outlines your concerns or disagreements re Items No. 2, 3, 4, 5 and 7 of the Conciliation Report Schedule A(2) resulting from the Conciliation Inspection at your home on September 13, 1988.

We have now had an opportunity to review your letter, the report itself, and discussed the matters with Mr. Rose.

It is the decision of the Program that the Conciliation Report Schedule A(2) will remain as written and we feel it is consistent with the terms and conditions of the Vendors warranty as set out in the Ontario New Home Warranties Plan Act and is a reasonable assessment of the nature of the complaints.

We believe the reasons given for not covering the subject complaints were quite adequate and sufficient as shown on the Schedule A(2).

You could, if you wish, sue your Builder on your own behalf or ask your Builder to submit to Arbitration under the Arbitration Act. However the Warranty Program would not be involved in either case.

Other than the above options, consider this letter and the subject Schedule A(2) previously sent to you with your Conciliation Report as being a Decision given by the Program in which your claim is disallowed and the Warranty Program is not prepared to offer you further assistance regarding your claim against Items Nos. 2, 3, 4, 5 and 7 of the aforementioned Schedule A(2).

Mr. Fischer now appeals this decision in his Reasons for requesting a hearing before the Tribunal as to decision on Schedule A(2): Item 3 noisy floors and stairs. The noisy floors were that way before the wood had a chance to dry out. Builder agreed that there was a problem and tried to fix with shims, but gave up when the shims did not help. Also there is movement in the floors."

In his evidence, Mr. Fischer was most emphatic about the "creaking, cracking and snapping" sound on all floors. He considers that the remedy is to take up the rug and smooth the floor down properly with screw nails. We note, however, that screw nails are not required by the Building Code.

The Program's Conciliation Officer, Mr. Kenneth Rose had made a finding in his report on his attendance at the premises on September 13th, 1988, that there was no excessive movement or noise noted at the kitchen, bathroom, dining area or stairs. His evidence is that when Mr. Fischer was rocking on the floor (presumably in a rocking chair), then there was movement in the floor. He pointed out, however, that the flooring was tongue and groove spruce plywood and not aspenite, the latter of which creates more problems with noise. He also said that when Mr. Fischer stood underneath the kitchen cabinets, there was some creaking noise caused where the vinyl meets the wall. Apart from this, he could find no unusual noise.

Mr. Rose points out that in some areas, a spiral finishing nail could be driven through the carpet where the plywood riding on an ordinary nail makes a squeak. In his opinion, there is really no serious problem with any of the floors, but he concedes that possibly the floor in the upstairs bathroom could be improved. This, however, would require the vinyl tile to be taken out, although perhaps only in some areas.

We are of the view that we cannot expect the same findings from the Program's Inspector as a result of one or two visits to the premises as we might from the man who lives there, particularly with regard to the complaint we are now addressing. One can see that a noisy floor must be a continual source of annoyance to a family which endures it daily and also must diminish their pride in their new home. The problem is of sufficient weight that it must be addressed by the Program and the solution, according to the evidence, is neither insurmountable nor expensive.

We note this home was constructed in February and completed during the winter and spring. As Mr. Rose has pointed out, there is a tendency for wood to shrink, but we are of the opinion that this is not the major cause of the problem. It appears to us that there has been insufficient nailing of the floors and, therefore, the warranty provided for in Section 13(1)(a)(i) of the Act has been breached. The floors have not been completed in a workmanlike manner. On the other hand, we do not find that the rugs have to be taken up to address the complaint, but that nailing through the rugs, where necessary, with spiral nails should be sufficient. In the upstairs bathroom, however, the tile may have to be removed to complete the repair.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, we are allowing the claim and direct the Ontario New Home Warranty Program to take the appropriate and necessary steps to attempt to satisfy the claim in Item 3.

As far as the other four complaints are concerned, we take it that these have been given the attention of the Program and the Builder to the satisfaction of the owner.

ALBERT H. GANESH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MacFARLANE, Member

APPEARANCES:

ALBERT H. GANESH, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 6 October 1989

Toronto

REASONS FOR DECISION AND ORDER

This is a claim asserted by Albert H. Ganesh arising out of an Agreement of Purchase and Sale of November 28th, 1987 from 439791 Ontario Limited carrying on business as Michael Teschnere, Executive Homes, of property located at 34 Dalmation Crescent, Scarborough, Ontario.

The purchase was concluded and Mr. Ganesh moved into the home on June 27th, 1988. The claim was received by the Program on July 18th, 1988. Subsequently the matter proceeded to conciliation and a report was issued October 4th, 1988. Subsequently work was done on the home and reinspection occurred. A further inspection and report was made October 2nd, 1989 and was filed before this Tribunal as Exhibit 8.

Both the Program and Mr. Ganesh acknowledged before the Tribunal that the work detailed in Exhibit 8 was the current state of affairs as between the Program and Mr. Ganesh. This inspection report consisted of eight items which the Program acknowledged were covered under the Ontario New Home Warranty Program and nineteen items which were not covered under the warranty.

At the opening of the hearing, counsel for the Program informed the Tribunal that the Program was prepared to accept as a warranted item, Item No. 6 in the list of non-warranted items,

namely, the defective laundry tub. This, therefore, left for consideration the remaining eighteen items referred to in Exhibit 8 as not being warranted, together with three items: damage to aluminum soffit and dent in the aluminum ceiling of the front entrance which had been excluded in Item 1 of the warranted matters and tile work in washrooms and showers excluded from Item 3 of the warranted matters.

There was a real problem for the Applicant, Mr. Ganesh, in understanding what was covered under the Warranty Program. He indicated to the Tribunal that in his mind, every matter with which he was dissatisfied should be covered by the warranty. This lack of understanding has given rise to certain acrimony between the Applicant and representatives of the Program. In fact, it appears to the Tribunal that the Program has been and is continuing to attempt to resolve obligations under the statute. This does not mean that Mr. Ganesh may not have a remedy in some other forum where he can pursue matters of contract against his vendor, but his rights against the Program concerning most of the matters of which he complained are limited to those established by the legislature in enacting the statute.

It is important, therefore, to set out what the warranty was at the time of Mr. Ganesh's purchase. This is contained in Section 13(i)(a) of the Act which provides that the home

13(1) Every vendor of a home warrants to the owner,

- (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code

(b) that the home is free of major structural defects...

None of the matters of which Mr. Ganesh complains would come within the definition of structural defects and, therefore, his warranty is limited to Section 13(1)(a) subject to any exclusions referred to in Section 13(2), and any decisions made over the years by this Tribunal or the Courts. It has been decided, for example, that matters of design unless they come within the matters referred to in Section 13 of the Act are of a contractual nature, as between the purchaser and the vendor. In addition, damage caused by third parties is similarly excluded.

On the basis of this, the Tribunal carefully examined the

items of which Mr. Ganesh complained and has found as a fact from the evidence presented the following.

With respect to the damage to the aluminum soffit and ceiling over the front entrance, the Tribunal finds these to be superficial and concurs with the Program that these items were not identified in Mr. Ganesh's letter received July 18th, 1988 and only first came to the attention of the Program on its inspection of September 9th, 1988 at which time the Program was unable to make a finding of whether this had occurred by reason of some act of a third party.

With respect to the tile work covered under Item 3 of the Program's accepted work, the Tribunal concurs that the tiles on the ceiling over the tub are very uneven and must be corrected, but that the floor in the main bathroom and showers are not covered by the Program, nor is there any requirement to cap the tiles.

With respect to the items specifically mentioned as not covered under warranty in Exhibit 8:

Item 1 dealing with the ensuite marble tub was reviewed extensively. The evidence of the Program's inspector indicated that if the builder had created the damage, the Program would accept responsibility and either repair or replace. In view of the fact, that the inspector indicated that the tub appeared not to have been used, which was the direct evidence of Mr. Ganesh, the Tribunal is of the view that this is a matter which should be added to the list of warranted items.

With respect to the other matters covered in Exhibit 8, commencing with Item 2 concerning the installation of a double sink in the ensuite and main washrooms, the Tribunal agrees with the Program that this is a contractual matter. With respect to the complaint concerning the colour of the bricks and the minor cracks identified, the Tribunal finds these not to be so excessive as to be warranted. With respect to the question of the rear step location, this is a design matter and again is between the purchaser and his vendor.

With respect to the complaints concerning the poor air volume, the Program's inspection revealed that there was sufficient air flow. The evidence presented by the Program to the Tribunal was that if an investigation by the municipality having jurisdiction were to determine that there was a problem, then the matter would come under warranty. Until such time as Mr. Ganesh has the municipality make such determination, however, this matter is not covered under the warranty.

The Tribunal is satisfied from the evidence of the Program that the carpet joins are not unusually visible and are, therefore, not covered under the warranty. With respect to the nail pops, the Tribunal is of the view that this has resulted from the normal shrinkage of materials caused by drying after construction and is excluded under Section 13(2)(d) of the Act.

With respect to the driveway completion, again this is a contractual matter. With respect to the landscaping, again this is a contractual matter subject to any requirements by the municipality under its subdivision agreement. Again, the owner's remedy may very well be directed to the municipality.

With respect to the location of the windows in the bedrooms and dining room, the Tribunal notes that the location of the windows is of a minor variation and, in any event, may pertain to design and is, therefore, not covered under the Program's warranty.

With respect to the rough hardwood flooring and the carpet between the hall and the living room, the Tribunal agrees with the Program that these are minor and not covered under the warranty.

Two items referred to as No. 14 and No. 15 in the unwarranted items could not be identified by the owner and are, therefore, not considered part of the complaint.

With reference to the scratched double sink in the kitchen, again this is a matter for which responsibility cannot be assessed and, therefore, is not covered under the warranty. The Tribunal accepts the evidence of the Program that the steel windows in the basement have been finished properly in accordance with the basic contract and that any further painting is the responsibility of the owner. The installation of weatherstripping on the screens would be improper according to the evidence of the Program and, in any event, this is a design matter which would not be covered under the warranty.

No evidence of moisture on the skylight could be observed by the Program's inspector, nor any evidence of damage occasioned by such moisture and the Tribunal, therefore, finds this not to be warranted as well.

On the basis of the evidence presented, therefore, the Tribunal finds that the following items are covered under the warranty.

- defective counter top in ensuite bathroom;
- damage to front door;
- tiles on the ceiling over the bathtub in the main bathroom;
- window locks;
- leaks in basement;
- leaky gutter;
- draft leak through door;
- oak mantle warping
- damage to the ensuite marble tub; and the
- defective laundry tub.

Pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal therefore directs the Ontario New Home Warranty Program to proceed to remedy the warranted items as so found in accordance with the provisions of the Ontario New Home Warranties Plan Act.

JOHN R. HENDERSON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES:

JOHN R. HENDERSON, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 9 December 1988

Toronto

REASONS FOR DECISION AND ORDER

The Tribunal has a great deal of sympathy with both the Applicant and the Programme in respect to the home which is the subject matter of this application. It appears that major defects occurred in the construction of this home and rectification of many of these was not completed for at least two years. There is no doubt that this resulted in a feeling of frustration on the part of the Applicant which was quite obvious in his presentation of evidence to the Tribunal. The Programme on the other hand has attempted to help the Applicant get the problems corrected. In particular Mr. Hart, the regional manager of the Hamilton Warranty Office candidly admitted that some of the work was not done very well and that the appearance was not great as far as the exterior brickwork was concerned. He also indicated a concern over the use of caulking instead of quarter-round between the floors and baseboards in the house and advised the Tribunal that the Programme was prepared to re-inspect and correct this particular defect where it occurs.

With respect to three of the other four complaints of the Applicant, it appears to the Tribunal that the Programme has effectively dealt with these. It caused the bay window to be corrected although it took at least two occasions to do so. The exterior brick work appears on the evidence to be within acceptable standards, as does the grouting in the ceramic tile

floors in the house, even though the Applicant continues not to be fully satisfied.

The major complaint of the Applicant continues to be the house elevation which he classed as lower footings. It appears that the builder, in order to provide higher ceilings in the lower portion of the house, dropped the footings a concrete block in height lower rather than adding a concrete block at the top, so that the net effect is that the Applicant's house is lower than the other houses in the area. It is, therefore, not surprising that flooding would occur in the Hendersons' home. Evidence was presented to the Tribunal that the rear yard grading goes right up to the brickwork. Photographs tendered in evidence showed that a small excavation has been made around the rear door requiring a person exiting from the rear door to step up into the rear yard. Further evidence was given that no further remedial grading could be done because of the municipality's grading plan for this area. The Tribunal is not satisfied, however, that because of the construction fault that continuance of this existing grading may not cause further problems to the Applicant. In any event, the present small excavation at the rear door is aesthetically unattractive and for these reasons the Tribunal is of the view that some grading rectification along the rear of the Applicant's home should be made.

Counsel for the Programme submitted that grading problems are not covered by the Act and the Tribunal agrees with this submission. It appears to the Tribunal, however, that the defect of which the Applicant complains, the lowered footings, is exacerbated by the grading which places the rear yard above his rear floor elevation as revealed in the photograph of the rear door and its minimal excavated exit. As it is impossible to elevate the house, in the view of the Tribunal the only practical solution is to create a "friendly" grading elevation across the rear of the Applicant's home.

Therefore by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim in the following respects:

- 1) Remove the earth along the whole extent of the rear of the house to expose 6 inches of concrete block for a distance of 8 feet in perpendicular width from the rear wall of the house, install

woolmanized timbers as support for the soil remaining, install steps from the excavated area to the remaining graded yard, install new top soil and sod in the excavated area;

- 2) Inspect the baseboards throughout the house and correct, where required, after removal of all caulking by the installation of quarter-round or its equivalent.

THEODOROS KARIPIDIS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
TIBOR PHILIP GREGOR, Member
STEPHEN PUSTIL, Member

APPEARANCES:

THEODOROS KARIPIDIS, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 2 May 1989

Toronto

REASONS FOR DECISION AND ORDER

Mr. Theodoros Karipidis purchased a home at 26 Anvil Court in Richmond Hill from Senator Homes and took possession on July 28th, 1987, as the Certificate shows; with the closing of the transaction on July 31st, 1987. On December 2nd, he wrote to Senator Homes requesting that some twelve items be repaired. A request for conciliation was made on February 9th, 1988 when a further five items were added.

An inspection took place on April 18th. Six Schedule A(1) items under warranty and fifteen Schedule A(2) items not under warranty were inspected. Mr. Karipidis was not satisfied with some of the decisions made as to his complaints, and a reinspection took place on July 5th. On that occasion, five complaints under Schedule A(1) and several complaints under Schedule A(2) were considered. Certain of the items were attended to, but Mr. Karipidis was still not satisfied about seven matters.

A second reinspection occurred on September 20th with three items noted in Schedule A(1) and fifteen items noted in Schedule A(2). On this occasion, photographs were taken of various items by Mr. Lorne Thurston, a senior conciliator for the Program.

On October 19th, Mr. Karipidis again wrote to the Program setting forth eight complaints which were in turn

answered in detail by Mr. George Stinson, the manager of the Toronto Regional office. Mr. Karipidis was informed that all of these items were refused coverage under the Program.

Mr. Karipidis appeals the refusal to deal with six particular items to this Tribunal. Those items were set out in his letter of January 9th, 1989 and he added a further three items during the hearing.

The Tribunal heard from Mr. Karipidis on each of the following items and reviewed the photographs which he presented. In each case, reply was made by Mr. Thurston and Mr. Gary Price, a conciliator with the Program; and the photographs which they submitted were also reviewed by the Tribunal.

Claim 1 "Kitchen floor still uneven"

From his first letter and through each inspection, Mr. Karipidis has been concerned about his kitchen floor, and what was done to repair it. The builder had installed wedges to fix some bowing and had cut joists which had crowned while laying a full length joist alongside those cut which were then fully secured. Mr. Karipidis believes that the vinyl floor covering should be removed so that more nails through the floor boards and into the joists would stop any movement.

The inspectors for the Program consider that the floor repairs were routinely and satisfactorily made and that any such movement is normal for a wooden floor. The Tribunal finds that the repairs have been made in accordance with usual building practices and that there is neither a requirement for renailling, nor is the floor overspanned. The Tribunal disallows this claim.

Claim 2 "Kitchen ceiling damaged while attempts made to correct the floor"

The claim of an apparent long hairline crack caused by the hammering on the floor joists is advanced by Mr. Karipidis. A crack line did appear above the kitchen cupboards, but such a crack is the result of normal shrinkage of materials caused by drying after construction and would not be a warranty item. There is a slight discolouration apparently from a drywall seam which shows, but this is not accepted by the Tribunal as a warranted defect, and the claim is disallowed.

Claim 3 "Outside brick vertical joint caulked - should be cemented"

Mr. Karipidis believes that the brickwork is not straight and that the wall should be rebuilt, and he agrees that there have been no water leaks. On the first inspection, this item was acknowledged, and the builder has visited twice to remortar. Cracks have reopened and the usual practice then is to use a bead of caulking to complete the water seal in a normal construction procedure. There was excessive splattering of mortar and the Tribunal agrees that the builder is to be recalled to complete this clean-up work. Otherwise the standard of work is normal under current practice and while the joint may look somewhat wide and ungainly, there is no structural defect so this portion of the claim which was first advanced on April 28th, 1989, is not accepted by the Tribunal.

Claim 4 "Basement walls still have cracks"

Mr. Karipidis is concerned about certain basement cracks, two of which have had minor water seepage and the third of which was a wider crack which was repaired using a non-shrink hydraulic cement and from which there has been no water leakage. The Tribunal finds that the several horizontal "knife-blade" cracks across the patches are the result of normal drying and that the vigorous water tests performed in April 1988 have shown no leaks at all. There are no settlement cracks or concrete crumbling which would indicate any structural problems and this claim is disallowed.

Claim 5 "Stairway drywall needs resurfacing because the joints are showing"

Here there is said to be replastering needed to make a straight wall in the rise to the second floor facing the stairs. The matter was shown to the inspectors, but did not appear on any of the three inspection reports. The Program has accepted this item as requiring further inspection and agrees to leave this matter open for a possible future claim.

Claim 6 "Inside base of fireplace is cracked"

A fine "Y" crack some four inches in length exists in the ceramic base cover poured in the steel box base of the fireplace. The fireplace has been used from five to ten times, and the crack may have been caused by a dropped log, or may have been present when the fireplace box was received or may have been caused on installation. In any case, the Tribunal

finds that this is not a safety hazard for normal use, nor is it a structural defect for the home, and the Tribunal disallows this claim.

Claim 7 "Brickwork is uneven and the walls in the kitchen area bulge out"

The Tribunal accepts Mr. Karipidis' comment that he first showed this item to the inspectors on April 28th, 1989. The inspectors comment that normal variance in the laying of rough-edged brick occurs in installation. Since this is not a structural defect and since the claim was not made within a year so as to be a possibly warranted item, the Tribunal must disallow this claim.

Claim 8 "Water intake and drain pipes from the pedestal sink in the powder room are exposed and unattractive"

These pipes would no doubt ordinarily have been enclosed in a vanity cabinet and were installed normally for such an expectation, however, the pedestal sink is an extra item. While the pipes can be within the wall, the type of construction here shows neither defective workmanship or materials. The Tribunal cannot find that the builder should remedy this aesthetic problem, and the Tribunal disallowed this claim.

Claim 9 "All the outside windowsill and trim paint is peeling because interior paint was incorrectly used"

Since this possibly warranted claim was not made within the one year after occupancy, the Tribunal must disallow this claim.

Having examined all of the above complaints asserted by Mr. Karipidis, the Tribunal by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, directs the Ontario New Home Warranty Program:

- a) pursuant to Claim 3, to attend to the necessary cleaning up of the splattering of the mortar;
- b) pursuant to Claim 5, to inspect the plastering of the main floor stairway area; and
- c) to attend to the warranted eavestrough problem as acknowledged by the Program.

MR. AND MRS. L. KOGAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
D.H. MacFARLANE, Member

APPEARANCES:

MR. AND MRS. L. KOGAN, appearing on their own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 September 1989

Toronto

REASONS FOR DECISION AND ORDER

This was a claim pursuant to Section 14 of the Ontario New Home Warranties Plan Act in respect of what the Applicants submit is a major structural defect. Mr. and Mrs. Kogan are the second owners of the subject home and the evidence clearly indicates that the claim was made during the third year of the warranty period.

On behalf of the Applicants who represented themselves, the Tribunal heard the evidence of Mrs. Kogan. The claim relates to a vertical crack in the basement foundation wall which extends from grade to the fifth brick course. The crack penetrates the concrete foundation wall and the brick veneer, and is evident and observable from both the exterior and interior. The width of the crack is approximately 3 to 4 millimetres or, as the evidence indicated, the width of two credit cards. There was no evidence suggesting that the use of any portion of the dwelling has been adversely affected. Finally, there was no evidence presented to suggest that there has, at this juncture, been a failure of what is admittedly, a load-bearing wall.

To succeed, the Applicants must establish by evidence that there was a major structural defect as that term is defined in Regulation 726 under the Act, Section 1(o). That evidence must

satisfy the Tribunal on the balance of probabilities. In this case, since there has been no failure of the wall, and no adverse effect on the use of the home, the Applicants can only fit their claim within the definition of a major structural defect if they can satisfy the Tribunal that the load-bearing function of the wall has been adversely affected at this point in time.

Mrs. Kogan, a registered real estate broker, submitted that in her opinion the crack is a "major" crack. She stated that she based this view on what her brother, who is a professional engineer, had told her and based upon what she had read in an engineering text which she did not name. Unfortunately, the Applicants did not call Mrs. Kogan's brother to testify and did not submit any expert evidence whatsoever to support this position.

The Program's inspector, Mr. Straiko, who has eight years of experience in the building industry, inspected the crack in question, and testified that in his opinion, the crack was not a major crack. Moreover, he testified that in his opinion, the load-bearing function of the basement wall has not been materially or adversely affected.

The Tribunal is bound to decide each case based solely upon the evidence presented to it by the parties. In this case, the Applicants have failed to satisfy the Tribunal that this crack constitutes a major structural defect.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal disallows the claim.

The Tribunal notes that the five year warranty on this home will not expire until October of 1991. In the event that prior to that date, the basement crack does get wider or larger or otherwise changes such that it does materially and adversely affect the load-bearing function of the wall, or such that it materially and adversely affects the use of the building, then the Applicants may, of course, submit a further claim.

MR. AND MRS. J. McARTHUR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
WILLIAM WATSON, Member

APPEARANCES:

MR. AND MRS. J. McARTHUR,
appearing on their own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18 January 1989

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered July 19th, 1988, disallowing the claim by the McArthurs based on major structural defects in their home. The New Home Warranty Program, while admitting that the home contained defects, decided that they did not constitute major structural defects and were, therefore, not warranted under the Act because the first year warranty claim period had expired. The sole issue before this Tribunal, therefore, is whether the defects constituted major structural defects.

The facts, very briefly, are as follows:

In March 1986, the McArthurs signed a construction agreement with Schan Associates. Schan undertook to build the home, as a sub-contractor, for the McArthurs, as general contractor, for the sum \$159,314.00. Schan induced the McArthurs to assume the role of general contractors as they were to do a certain amount of work themselves; however the work that they were to do was far less than that of Schan. At the same time, Schan convinced the McArthurs that they would not qualify for a new home warranty under the Ontario New Home Warranty Program since they were doing some of the work themselves.

The home was completed for possession August 25th, 1986, the date on which any warranty under the Ontario New Home Warranty Program would take effect.

In March 1987, the McArthurs notified Mr. Schan of certain problems with the windows which were not closing properly, as well as the bowing of exterior metal sills. They confirmed these problems in a letter to Schan dated June 30th.

Although Mr. Schan had given the McArthurs a warranty on his work and materials, he failed to live up to his obligations. He took no serious steps to correct the defects complained of. Instead, he stalled the McArthurs until December 18th, 1987, when he informed them that he was no longer in business.

There is no doubt as to the bad faith of Mr. Schan during the whole course of this affair: first, he convinced the McArthurs that they were not entitled to the benefits of the Ontario New Home Warranty Program when in fact, they were; second, he failed to honour the warranty he himself had given.

After receiving Schan's letter, the McArthurs finally contacted the Ontario New Home Warranty Program to find out if there was anything that could be done for them. The Program informed them that they were no longer entitled to the one year warranty against any defect in material or construction (Section 13(1)(a)) because more than a year had expired since they had taken possession of the home. The Program, however, registered the McArthurs in the plan to warrant their home against major structural defects for a four year period from the taking of possession of the home (Section 14(1)(c)). Apparently such registration was permitted without the McArthurs having to pay the Program.

The McArthurs then filed a claim against the Program for major structural defects in their home. This claim was refused by the Program.

Mr. Nicholas Aplin, an engineer, acted as an expert witness for the McArthurs. He testified that he had visited the property only once, on November 2nd, 1987, and had prepared a report of his findings dated November 27th, 1987, which was produced as Exhibit 3(b).

As appears in his report, he was called upon to assess the reasons for deficiencies in the structure which involved windows and doors which did not open freely, as well as sloping

floors. From the testimony of the McArthurs and the documentation, it was the problem with the windows which was the most urgent.

In his report and testimony, Mr. Aplin said that he saw nothing indicating a safety problem with regard to the structural adequacy. He stated in his report: "The problems seen are no doubt annoying to owners of a new home, but do not pose a hazard."

In his opinion, which was accepted by the experts for the Ontario New Home Warranty Program, the reason for the doors and windows sticking was the result of a differential movement between the wood frame wall and the brick veneer. It was generally agreed that the cause of the differential movement was the shrinkage of the wood framing which made the brick sills rise above some of the wood windows. Unattended, this would allow water to penetrate through them.

The shrinkage in the wood structure was uniform, even if more than normal. As a result, the structural integrity of the home was in no way threatened. As well, the bricklayer may not have taken into account the degree of shrinkage when laying the bricks.

Mr. Aplin stated that proper caulking of the windows could prevent the problems from getting worse, but was not a permanent solution. Mr. Aplin was asked whether the problem with the windows could be solved by simply removing one layer of bricks so that the window was again flush with the wooden sill. This type of repair would not be expensive. Mr. Aplin could not give a definitive answer, but thought that this approach might work.

While Mr. Aplin spoke of possible leakage into the home, he saw none on his sole visit.

Mrs. McArthur was the next to testify. She stated that the McArthurs had paid Schan \$150,000 to do his work and had put in \$70,000 of their own work, not including the land. She also stated that the problems with the windows were more extreme on the second floor.

Mrs. McArthur testified that the major problem in the home was the windows.

Mr. Dan Moreau was the first expert to testify on behalf of the New Home Warranty Program. He is a structural

engineer who has done numerous examinations for major structural defect claims. Prior to being employed by the New Home Warranty Program, he was in the construction industry.

He inspected the McArthur home twice - on June 14th and August 15th, 1988.

He corroborated the findings of Mr. Aplin as to the differential movement and its causes. He testified that the shrinkage was more than normal, but was within the limits allowed by the Building Code. This would coincide with Mr. Aplin's findings as well.

He stated that the Program denied the claim of the McArthurs because despite the shrinkage being more than normal, it did not affect the structural integrity of the building or its livability or its load bearing capacity. He saw no evidence of water penetration through the windows or any signs of water staining.

Mr. John Reid, Manager, Eastern Ontario, Ontario New Home Warranties Program, was the final witness to testify. He was an architect. He has carried out inspections for major structural defects under the Program. He visited the McArthur home on January 1st, 1989, and saw the same problems as Aplin and Dan Moreau. He saw no sign of water penetration past or present. He went to the home with the Building Inspector of the Municipality and no major structural defects were found. He noted that the Building Inspector issued no orders after the visit.

From the testimony, as well as photographs presented, it is clear that the McArthurs have been able to live in their home and use each and every one of its rooms. In answer to various questions from the Tribunal, Mrs. McArthur admitted that she made full use of the home. The home itself appeared attractive and sturdy in the photographs presented.

On the other hand, there is no doubt that the home contains defects which are unacceptable and would be subject to warranty under the New Home Warranty Plan providing a claim had been made within the first year of occupation. Unfortunately, this was not done.

The defects in the structure through shrinkage, can be characterised as a structural defect. The question is, however, is this structural defect a major one and therefore subject to the four year warranty? The Tribunal believes it is

not because the home is suitable for living and the owners have made full use of it.

Section 1(o) of the Regulations under the Ontario New Home Warranty Plan Act defines a major structural defect as follows:

DEFINITION OF A MAJOR STRUCTURAL DEFECT

- (o) "Major Structural Defect" means, for the purpose of clause b of Subsection 1 of Section 13 of the Act, any defect in workmanship or materials;
 - (i) that results in failure of the load bearing portion of any building or materially and adversely affects its load bearing function, or
 - (ii) that materially and adversely affects the use of such building for the purpose for which it was intended,
- including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.
- (t) "Soil movement" means subsidence, expansion or lateral movement of the soil not caused by flood, earthquake, act of God or any other cause beyond the reasonable control of the builder.

The problem with the McArthurs' home does not fall within the definition of a major structural defect. It is to be noted that there is no leakage presently through the windows because of certain repairs carried out. Any further work to be done would not fall within Section 1(o) of the Regulations. In using the words "major", the Legislature must have had in mind a defect which threatened the very use of the structure.

The case of Dr. Louis Fields (1982) CRAT Volume 11, page 88 at pages 92 and 93 dealt with the term "major":

The use of the word "major" in the all-important phrase "major structural defect", which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. "structural defect" and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word "major". The defect must therefore be "major" to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

.....

In passing the Tribunal notes that the use of the word "major" implies the fact that there exists an antonym to that word or complementary opposite which is the word "minor". That is to say, the concept of a "major structural defect" implies the complementary concept of a "minor structural defect". The Legislature must have had both such kinds of deficiencies in contemplation - one warranted and one not warranted.

The Kennedy case (1982) CRAT Volume 11, p.109 held as follows at p.110:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse...

The Kennedy case was followed in the cases of Kenneth Earley (1986) Volume 15 CRAT at p.136 and Marilyn and Murray Ferguson (1987) CRAT Volume 16 at p.150.

The Tribunal is, therefore, of the opinion that the defect of which the McArthurs complain does not constitute a major structural defect under the Ontario New Home Warranty Plan Act.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

MIROSLAV MANAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MacFARLANE, Member

APPEARANCES:

MIROSLAV MANAS, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 2 February 1989

Toronto

REASONS FOR DECISION AND ORDER

Mr. Miroslav Manas purchased a home on Chedboro Crescent, Oakville and took possession on January 29th, 1988. On February 26th, he advised the builder, B.M.W. Properties Ltd. by letter of nine complaints he considered should be addressed.

Ms. Street, counsel for the Program, at the opening of this hearing observed that all of the complaints have been satisfied except one. Mr. Manas concedes that his only complaint now is the excessive noise from water running through the pipes and that forms the subject of this appeal.

Mr. Manas paid \$209,000 for the house, not an insignificant amount when one considers the ensuite bathroom and hardwood flooring which he undertook to complete as an extra. The price is relevant only in that he did not expect to be plagued with what he alleges is unnecessary noise from the plumbing in a house of that calibre, and the situation invokes our sympathy.

In his letter of complaints to the builder of February 26th, 1988, the Applicant advises:

The plumbing in the house is installed incorrectly. If anybody in any washroom

turns the water on or flushes the toilet all activities (T.V., radio, study, etc.) are cut off by the noise. If it happens at night everybody is woken up. We would like you to advise us of your schedule for correction as we cannot accept the noise for too long, especially when we are a family of four with different working times and it brings us sleepless nights and mornings.

His evidence before the Tribunal supports the complaint even one year later, but the reason for the noise has not been determined. The Applicant maintains the plumbing is incorrectly installed, but can make no specific recommendations to correct it. We are, therefore, at a disadvantage because the cause of the complaint has not been located. We believe Mr. Manas when he says the noise is to say the least annoying, if not exasperating, but no particular corrective action has been recommended or advised.

As a result of his complaint to the builder, a Conciliation Officer, Mark Roccatagliata, attended at the premises on June 24th, 1988 with two of the builder's employees Bart and David Wassmansdorf. Mr. Roccatagliata, a graduate of Mohawk College in Architectural Technology had been with the Program for eleven months. His report, found at Tab 2 of Exhibit 4, includes the following conclusion:

The noise generated by the running water is considered to be not excessive and is acceptable to normal building practice standard. Builder has volunteered to move one joist away from 3 inch A.B.S. stack (basement ceiling) and also to remove the stem from the tub tap to check for dirt etc. in an effort to reduce the creaking and churning noises.

Mr. Roccatagliata, however, was not fully satisfied with his findings and told Mr. Manas he would obtain a second opinion. As a result, a further conciliation meeting was arranged and Mr. Roccatagliata attended at the premises with his senior Conciliation Officer, a Mr. Richard Parker. On July 8th, 1988, Mr. Parker's Field Inspection Report, found at Tab 3 of Exhibit 4, reads as follows:

Mark asked me to assess the noise problem between the family room and the laundry room.

There is a noise but is not considered to be excessive.

The builder had the main shut off valve turned down one quarter turn. Owner wanted full pressure, builder turned it back up. Apparently pressure is 81 p.s.i.

Builder has volunteered to move one joist away from the 3 in ABS stack (basement ceiling) and also to remove the stem from the tub tap to check for dirt etc. in an effort to reduce the creaking and churning noises.

Told owner that the noise is not excessive and that the complaint is not warranted.

In attendance at that meeting were Mr. Wassmandorf, the builder, and the Applicant. Mr. Parker thought that the noise might be decreased by reducing the water pressure which was 82 p.s.i. He consequently reduced the pressure by turning the outside control valve. He apparently noticed little difference, although it is acknowledged there was some. Nevertheless although 81 or 82 pounds is apparently high, Mr. Manas insisted that it be left that way because of the reduced pressure in the pipes to the upstairs bathroom.

It is to be noted that at both Conciliation meetings, the builder offered to move one joist away from the 3 in. ABS stack (basement ceiling) and also to remove the stem from the tub tap to check for dirt in an effort to reduce the creaking and churning noise. It is also to be noted that the noise must be evident since the builder refers to it in his recommendation to the Inspector. Mr. Parker, however, in his report, points out to the Applicant that the noise is not excessive.

The builder, in an attempt to resolve the problem, did remove the stem from the tub tap checking for dirt and after reconsideration of the removal of the joist, shaved it instead so that it would clear the stack avoiding any friction or contact. This appeared to accomplish the same purpose. It has not, however, been the solution to the Applicant's complaint. Where then does it lie?

In his summation of the Reports submitted to him, Mr. Robert Hart, Regional Manager of the New Home Warranty Program in Hamilton, came to this conclusion:

The builder has advised me that a test has shown that the pressure in your lines is approximately 82 pounds per square inch. This is about average in your area.

There is no stated minimum, but the Building Department has confirmed that they consider 100 p.s.i. to be extremely high and that an acceptable minimum should be close to 40 p.s.i. Your's is at the high end of the scale.

The pressure can be adjusted (outside the house by the municipality, not by the owner) and I understand that this was tried but you objected to the change in pressure. There is also a pressure-reducing valve which can be installed inside (by the owner's plumber) but I do not know if this has been explained to you.

If the pressure is causing a noise which is objectionable to you (and we are not talking about banging in the pipes) this is something that is beyond the control of the builder. A similar situation occurred in the early stages of Glen Abbey subdivision where the first people in possession complained of extremely high pressure. As the subdivision grew and more homes were built, the demands on the main water supply increased and the pressure dropped. There are many, many more houses going in to your area during the forthcoming year and the Building Department feels that the high pressure will be reduced by the increasing demand on the supply.

The Program, therefore, felt there was nothing further the builder could do and disallowed the claim. Mr. Manas had filed his complaint within the first year of possession and falls within the provision of Section 13(1) of the Act which warrants:

- (1) Every vendor of a home warrants to the owner,
 - (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material
 - (ii) is fit for habitation and
 - (iii) is constructed in accordance with the Ontario Building Code.
 - (b) that the home is free from major structural defects as defined by the regulations
 - (c) such other warranties as are prescribed by the regulations.

It is, therefore, incumbent on the Applicant to prove to the Tribunal that the home is not constructed in a workmanlike manner, that it is not free from defects in material, that it is not fit for habitation or is not constructed in accordance with the Ontario Building Code. We can find no evidence that any of these warranties have been breached and with regard to the latter, the builder has given evidence that the Building Inspector has approved the construction as being in accordance with the Building Code. There is further no evidence of a major structural defect as defined by the Regulations.

This is not a conclusion which we reach lightly wishing to give the Applicant as much assistance and relief as possible. Since, however, we can find no evidence of a breach of warranty or structural defect, we must disallow the claim.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

HARISH MATHUR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
LOUIS A. RICE, Member

APPEARANCES:

HARISH MATHUR, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 17 August 1988

Toronto

REASONS FOR DECISION AND ORDER

When Mr. Harish Mathur took possession of his new home at 51 Wilclay Avenue, Markham, Ontario on August 29th, 1986, there were a number of items still to be completed by the builder. These were compiled in a list of some 66 complaints which Mathur directed to the builder, Canada Homes on September 27th, 1986. A copy of this letter was received by the Ontario New Home Warranty Program on October 1st, 1986 and acknowledged on October 3rd.

The Program on October 20th wrote to the builder requesting its attention to the matter, but on May 21st, 1987, there still appeared to be a number of complaints which comprised some 77 items outstanding. Eventually conciliation was requested by Mathur on August 21st, 1987. The Program's inspector, Mr. Douglas Irvine attended at the property on September 29th, 1987 and his report was mailed to the interested parties on October 13th, 1987. It appears that Mr. Irvine had considered some 52 complaints in his report and the majority of these had subsequently been addressed by the builder.

When the matter came before this Tribunal, Mr. Mathur indicated only six of the complaints remained outstanding. These were as follows:

1. The main complaint outlined in Exhibit 5, Item 16 at tab 12 was that several leaks in the basement had occurred, both in the walls and where the floor and the walls met. On August 15th, 1988, these leaks were still apparent.
2. The concrete entrance to the dwelling, in Mr. Mathur's opinion, needed to be corrected. This is Item 12 on schedule A(2) of Exhibit 5. He requested that it be dug down three feet and then a cement slab put over it.
3. Item 3, which is Item 10 on Schedule A(2) of Exhibit 5, the uneven handrail on the stairs from the main floor to the second floor, should be replaced, totally or in one section.
4. The floor squeaked very badly and he wanted the floor secured because the whole area squeaks. This is a complaint found in Schedule A(1), Item 4.
5. The beams in the basement had not been cleaned and painted. This is Item 7 on Schedule A(2).
6. Item 6 found on Schedule A(2), as Item 6, was that the insulation in the attic was insufficient and the rooms were cold at night.

The above complaints were enumerated in a letter from Mr. Mathur to the Program on the 17th of August, 1988 and would appear to be the only items remaining uncompleted. We can deal briefly with the three matters on which we have agreed with the inspector's report found at Exhibit 5, tab 12.

The uneven handrail is, in the opinion of Mr. Irvine, not defective in workmanship being the same width as the rest of the rail. He points out that it simply forms part of the curve of the rail. We accept his evidence on this point and the claim is disallowed.

The basement beams are in Mr. Irvine's opinion, simply dirty from the dried clay and dust which will brush off and, therefore, the claim is disallowed.

Mr. Mathur complains that the insulation in the attic is insufficient. The Program's inspector had measurements taken, both in the attic and basement, which he said revealed adequate insulation. We quote from his report, "Attic readings (6 taken at random) measured 10 - 14 1/2" and full coverage was

noted to all interior areas". On the evidence, therefore, we must disallow this claim.

The remaining three complaints trouble us and must be conceded to have some merit. Mr. Mathur appears to demand three feet of concrete to be poured under his front porch and then a slab placed on top of it. We do not agree that this is necessary, particularly in view of the conciliation report which indicates that the steps at the front entrance meet all Ontario Building Code requirements. Nevertheless, Mr. Mathur has filed a Deficiency Notice issued by the Town of Markham which says that on April 14th, 1988, the "steps have uneven risers and therefore is unsafe". If that condition still obtains, then we hereby direct the Program to ensure the builder will make the necessary adjustment to the steps.

Mr. Mathur in his evidence was quite adamant that the floors still squeaked. We note in the conciliation report of Mr. Irvine, Item 4 of Schedule A(1) at tab 12, that, "A loud floor squeak was noted between the laundry room door and front hall closet doors". If the reason for this or any other alleged squeaks is because the floors have not been properly secured, then we hereby direct the Program to make the necessary repairs.

The last complaint, which we view as the most serious, is that of water leaking through both the basement walls and at the angle where the floor and walls meet.

This Tribunal has taken the view on previous occasions that the basement of a new home is no longer the cellar - simply to accomodate the furnace and a wash tub. The intention of the average purchaser today is to complete a family room or study or office or recreation room in the basement. And if he does not do it, probably his successor will. It, therefore, must be habitable. If, however, water continues to seep in through the walls, it defeats the purpose for which it was intended.

From the evidence, it is clear the builder has tried very hard to repair the leaks complained of and to satisfy Mr. Mathur. Mr. Darin Bond, a witness on behalf of the Program, produced a guarantee dated the 4th day of June, 1988 reflecting the work done by his company, Structural Restorations Systems to the Mathur house. It reads, "We have repaired all the basement leaks today and it is guaranteed for five years to Canada Homes who is the builder of this structure".

Unfortunately, however, more leaks have appeared apparently in other places as indicated by the report of John Plitz, building inspector for the Town of Markham whose memorandum reads:

Aug 15/88 11:45 a.m.
51 Wilclay - Leaks still visible at
foundation wall at floor & cracks etc.
Work not completed.
"JP"

We are compelled to accept this as evidence that the work has not been satisfactorily completed and, therefore, direct the Program to remedy this defect.

By virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to repair the three items referred to above, that is: the leaks in the basement; the front step, if necessary; and the squeaks in the floor area.

BILL MOREAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
WILLIAM WATSON, Member

APPEARANCES:

BILL MOREAU, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 19 January 1989

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from the decision of the Ontario New Home Warranty Program to disallow the claim of Mr. Moreau. The decision was dated September 30th, 1988. In his claim, Mr. Moreau asked that the Ontario New Home Warranty Program carry out the following defective work under Section 13(1)(a) of the Ontario New Home Warranties Plan Act:

- 1) exterior painting not completed
- 2) garage floor poorly finished
- 3) sump pit. The warranty program is repairing the depth of it but doesn't mention anything to the discharge of water through pipe out back which circulates back into house through side entry door
- 4) catch basin which is not adequate enough when there is significant rainfall, water enters house
- 7) bedroom door swings open on its own, door is on a tilt

- 8) there is no building paper between the basement wall and the insulation
- 9) septic system is not complete with a use permit as noted by the Ministry of the Environment
- 10) mudroom entry drain - there is none

The Ontario New Home Warranty Program denied Mr. Moreau's claim stating that they had already paid \$20,000 for rectification of defective work under Section(6)(4) of the Regulations under the Ontario New Home Warranties Plan Act. The sum of \$20,000 was the maximum allowed under the Regulation at the time that Mr. Moreau's warranty was in effect. This limit was raised to \$50,000 on April 22nd, 1987, some four days after the expiration of Mr. Moreau's warranty.

Mr. Moreau argues that he is entitled to the increased amount because his warranty only began in the first week of May, 1986 when he actually took physical possession of his home. Thus, it would have been in effect at the date when the limits of coverage were increased to \$50,000.

This Tribunal must decide whether the warranty to which Mr. Moreau is subject is that of the Act prior to April 22nd, 1987, or to the new increased coverage provided after that date.

Mr. Moreau testified as follows:

In 1985, he entered into an agreement to purchase a home that was to be built. He made down payments of \$9,000 towards the purchase price. While the home was being constructed, he leased premises.

The home was originally supposed to be delivered in October of 1985, but by mutual agreement, the delivery date was postponed to the Spring of 1986.

On April 11th, 1986, Mr. Moreau met with the builder and they both walked through the home. At the end of the examination, the builder filled in the Certificate of Possession. As can be seen in the Certificate, a list was made of the various items still to be completed and a possession date of April 18th, 1988, was inserted. A later date of June 1986 had been struck from the Certificate and replaced by the April 18th date.

Section 13(3) of the Ontario New Home Warranties Plan Act stipulates that the warranties on the home take effect from the date of possession specified in the Certificate.

Mr. Moreau testified that at the behest of his own lawyer and the builder, he signed the closing documents for the purchase of the home on April 18th, 1988, at which time he also received the keys to the home. Mr. Moreau or his attorney was in possession of the Certificate of the Possession at that date.

Mr. Moreau further testified that he had a lease the expiry of which was fixed for May 15th, 1986, and therefore was not in any rush to actually move into the home. He went on to say that before moving into the home, he had to take possession of it in order to allow the carpet layers to enter and install the carpets. He chose the carpeters and had assumed responsibility for paying all their fees and expenses.

As soon as all the carpeting was in place, Mr. Moreau made arrangements to move into the home with his wife. During the period in which the carpeting was being installed, the builder did nothing to correct the work that had been listed on the Certificate of Possession.

Mr. Moreau stated that the only thing that prevented him from taking physical possession of the home on April 18th was the absence of carpeting. He stated that he had to have possession of the keys to the home before the carpeting could be done.

Mr. Moreau admits that the Ontario New Home Warranty Program paid him an amount of at least \$20,000 to cover the costs of rectification of defective work. More particularly, Mr. Moreau admits that the Ontario New Home Warranty Program had its contractors perform work for which the Program paid the Contractor \$5,585.00. When some of this work proved unsatisfactory, the Program had it repaired at its own cost.

Ten days before the warranty period of one year expired, a new list was submitted by Mr. Moreau setting out all the remaining defects in the home to be repaired. In valuing the work to be done, the Ontario New Home Warranty Program determined an amount of \$16,650.00. On July 20th, 1987, the Program sent a letter to Mr. Moreau saying that they would be prepared to pay the sum of \$14,415.00, which was the remaining amount due under the \$20,000 warranty. The letter made clear that even though the repairs to be done exceeded \$14,415.00,

the Fund would only be prepared to pay the lower amount since that brought the compensation to the maximum amount then permitted under the Regulations. Mr. Moreau accepted payment of this amount of \$14,415.00 and signed a "Full and Final Release".

The Tribunal finds that Mr. Moreau did in fact take possession of the home on April 18th, 1987, even though he continued to stay with his wife at the rented apartment. While he did not physically occupy the home, he had the keys to it and had his own workers operating within the premises. This constitutes effective possession.

Section 4 of the Ontario New Home Warranties Plan Act states that a warranty under Section 1 only applies in respect of claims made within one year after the warranty takes effect, that is one year after the date of possession. In the case of major structural defects, the warranty period is for four years. It is in proof that none of the repairs sought by the Applicant are for major structural defects.

At the time that Mr. Moreau took possession of his home, the limit of liability fixed by the Regulations was \$20,000 as per Section 6(4).

The warranty period for Mr. Moreau expired April 18th, 1986.

On March 19th, 1987, certain amendments were made to the By-laws increasing the amount of the warranty to \$50,000. These amendments were filed April 22nd, 1987.

Section 3 of the Regulations Act states that unless otherwise stated, a regulation comes into force and has effect on and after the date upon which it is filed. This means that the increase in the warranty would have taken effect as at April 22nd, 1986 - four days after the expiration of Mr. Moreau's warranty.

The enabling legislation did not provide for retroactivity of the provisions increasing the warranty; such retroactivity cannot be presumed.

There have been many cases holding that the courts will not presume a statute or regulation to be retroactive unless the Legislature expressly enacts such retroactivity. In the case of Pratt vs McLeod (129) D.L.R. (3rd), p.123, the Court held that "in the absence of express words or necessary

implication that a statute is intended to have retrospective force, the statute will not be interpreted to attach new consequences to an event which occurred prior to its enactment."

Under the circumstances, the warranty on Mr. Moreau's home provided by the Act, expired before the increase in warranty coverage took legal effect. Mr. Moreau, therefore, had received the full amount allowed to him by the Act and Regulations, and could make no further claim against the Program, except for major structural defects. Since no such major structural defects have been proved or even claimed, Mr. Moreau is entitled to no further payments or repairs from the Program. For this reason, the Tribunal has no choice but to dismiss Mr. Moreau's claim against the Ontario New Home Warranty Program.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

NORQUAY HOMES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
D.H. MacFARLANE, Member

APPEARANCES:

ANDRE MICHAEL, representing the Applicant

BRIAN M. CAMPBELL and CAROL A. STREET,
representing the Ontario New Home Warranty Program

DATE OF

HEARING: 3 October 1988

Toronto

REASONS FOR DECISION AND ORDER

In this matter, the Applicant Norquay Homes Limited appeals to the Tribunal on an issue of law alone. The grounds for appeal are based on the question of whether or not Section 12 of Regulation 728 (which I will hereinafter refer to as the offending section) is ultra vires the Ontario New Home Warranties Plan Act.

The facts are not in dispute and can therefore be stated briefly. Norquay Homes Limited is a reputable builder of homes in London, Ontario and had been registered under the Ontario New Home Warranties Plan Act, enrolled as a builder and had experienced no difficulties with the Program in fifteen years of operation. When, however, on February 17th, 1987, it received a Bulletin from the Program advising of an amendment to the Regulations requiring what was called the "Addendum" to be attached to every Offer to Purchase and proof thereof by statutory declaration signed by the builder, the Company refused to comply with the Regulation and on February 26th, 1987, gave the Registrar notice to that effect.

The Company subsequently applied for a renewal of its registration which the Registrar would not approve on the grounds of its refusal to comply with the Act. This decision resulted from the letter of February 26th, 1987, from a Mr. Michael Howe on behalf of Norquay Homes Limited to the Registrar and subsequent correspondence, the former of which we reproduce:

NORQUAY
HOMES LIMITED
101-100 WELLINGTON ST.
LONDON, ONT.
N6B 2K5

February 26, 1987.

Ontario New Home Warranty Program,
600 Eglinton Ave. East,
Toronto, Ontario.
M4P 1P3

Attention: Mr. C. Edmund Locke

Re: Addendum to Agreements of Purchase and Sale

Dear Sir:

We wish to advise that we are not prepared to attach the requested addendum to our offers to purchase, as we feel that it has many inaccurate statements, which in no way apply to our offer or operations and in general it is an exceedingly inflammatory document. It will cause an unfounded suspicion between our clients and this company, and will cost our clients additional expense resulting from unnecessary legal review.

This corporation has never had a late closing in over fifteen years of home building, has never terminated an agreement of sale with a purchaser who was not in default, and our offer to purchase specifies the rate of interest applicable to the mortgage being assumed by the purchaser. Furthermore, our offers to purchase are for a fixed price and do not provide for any increase in price after the contract has been signed. To suggest by "disclosure" that our corporation may take part in activities which would be injurious to a purchaser I find in the least offensive and moreover libelous.

This is another knee-jerk reaction to a specific problem in the Toronto market caused by a minority element in this industry. Rather than dealing effectively with the problem at its source, i.e. terminating registrations of the offending builders, O.N.H.W.P. wishes, on behalf of the provincial government to tar our entire industry with the brush

of dishonesty. The addition of this disclosure to agreements of sale entered into by reputable builders will not solve the problems presently being experienced in the Toronto market, and will only foster further mistrust between this industry and the consumers we deal with.

We respectfully submit that it would be more appropriate to take action against those people who are the cause of the problem, not those reputable builders who are trying to maintain a high standard of service to the public. We trust that you appreciate our position in this matter.

Yours very truly,

Michael E. Howe

On March 18th, 1987, C. Edmund Locke replied on behalf of the Program:

ONTARIO NEW HOME WARRANTY PROGRAM
600 Eglinton Ave. East, Toronto, Ontario M4P 1P3 PHONE:(416)488-6000

March 18, 1987.

Mr. Michael E. Howe,
Norquay Homes Limited,
101-100 Wellington Street,
London, Ontario
N6B 2K6

Dear Michael:

Re: Addendum to Agreements of Purchase and Sale

I have your letter of February 26th and there are many things in it with which I agree. However, this Addendum was issued at the specific request of a committee, which consisted of the Chairman of the Ontario Home Builders Association, representatives of the Ministry of Consumer and Commercial Relations, representatives of Ministry of Housing, the Building Industry Strategy Board, the Urban Development Institute and others. It was approved by our board on the basis of the recommendations made by the industry itself.

I do indeed appreciate your position and, as far as this Program is concerned, we will continue to deal appropriately with builders who do not subscribe to the high standards subscribed to by the major portion of the industry.

I hope, Michael, that you will reconsider your stated position with respect to attaching the requested Addendum to your offers of Purchase and Sale. The last thing I want to do is to revoke your registration in accordance with our Act. That is a choice I really do not want to make.

Sincerely,

C. Edmund Locke,
President/Registrar.

P.S.

I do not really think you should take this personally. After all, you know we have laws against murder, robbery, etc., and as far as I know you have committed none of these offences (yet)!

Further correspondence took place between the parties during the succeeding months and finally on November 11th, 1987, the Registrar gave notice of his intention to revoke the registration of the company on the following grounds:

1. Pursuant to the provisions of Section 8(2) of the Ontario New Home Warranties Plan Act R.S.O. 1980, Chapter 350 (the "Act"), the Registrar finds you are in breach of a term or condition of registration, to wit:
 - (a) You have failed to provide a statutory declaration pertaining to the Addendum to Agreement of Purchase and Sale requested of you by letters dated September 17th, 1987 and October 26th, 1987.
2. Pursuant to the provisions of Section 8(2) of the Act, you are in breach of a condition of registration, to wit:

- (a) You have failed to comply with Regulation 728 requiring you to furnish such documentation as the Registrar may reasonably require.

The result has been this appeal based on the issue of whether or not the offending section is ultra vires the Act.

The Bulletin of February 17th, 1987, gives some insight into the background of the legislation and reads as follows:

ONTARIO NEW HOME WARRANTY PROGRAM
600 Eglinton Ave. East, Toronto, Ontario M4P 1P3 PHONE:(416)488-6000

B U L L E T I N No. 14
February 17, 1987

ADDENDUM TO AGREEMENTS OF PURCHASE AND SALE

In order to alleviate some of the problems associated with delayed closings, discussions were held between The Ministry of Housing, the Ministry of Consumer and Commercial Relations, The Ontario Builders' Association, The Toronto Home Builders' Association, The Urban Development Institute, The Building Industry Strategy Board and The Ontario New Home Warranty Program. Out of these discussions emerged a requirement for an addendum to agreements of purchase and sale.

In accordance with Section 9(5) of Regulation 726, Section 1(5) of Regulation 728 and the provisions of your vendor/builder agreement executed with the Program, it is a term and condition of registration that the attached addendum be incorporated into each agreement of purchase and sale and/or construction contract with respect to single family, duplexes and semi-detached dwellings. It does not apply to condominiums.

This requirement becomes effective on March 2, 1987, and affects all agreements of purchase and sale entered into on or after March 2, 1987. Any breaches of this requirement may result in the Registrar instituting revocation proceedings.

These new provisions improve the standards of disclosure and provide home purchasers with substantial rights with respect to extension and termination of agreements of purchase and sale. The addendum also advises purchasers of specific issues which they should examine in their agreements of purchase and sale.

Use of this addendum will make prospective purchasers better informed, and will help to forestall potential misunderstandings throughout the buying process.

Builders and/or vendors are required to sign and return one copy of the attached statutory declaration stating that they will include the addendum with each agreement of purchase and sale, effective March 2, 1987.

C. Edmund Locke
President/Registrar

Section 12 of Regulation 728 was approved on June 18th, 1987, filed on June 19th pursuant to Section 3 of the Regulations Act, R.S.O. 1980, Chapter 446 as passed by the Directors of the Corporation on March 19th, 1987. It was then duly published in the Ontario Gazette. The Regulation provides as follows:

The registrant shall furnish to the Registrar proof that the following Addendum forms part of every purchase agreement, within the meaning of clause 1(r) of Regulation 726 of Revised Regulations of Ontario 1980 (Administration of Plan) in respect of every home of a type referred to in subclause 1(d)(i) or (ii) of the Act constructed by the registrant.

The Addendum now required to be attached to every offer to purchase is set out here because of its direct relevance to the issue before us.

ONTARIO NEW HOME WARRANTY PROGRAM

THIS DOCUMENT CONTAINS IMPORTANT INFORMATION
FOR THE CONSUMER

ADDENDUM to AGREEMENT of PURCHASE and SALE

This addendum forms part of the Agreement of Purchase and Sale Between:

_____ ("Purchaser")

and

_____ ("Vendor")

dated _____, (the "Agreement")

DISCLOSURE

1. Purchasers should note that the Agreement may contain provisions about some or all of the following:

- (i) There may be notices or conditions by which the Vendor may terminate this Agreement regardless of whether or not the Purchaser is in default;
- (ii) It may be a condition of closing that the Purchaser be approved by mortgage lender(s);
- (iii) The rate payable on any mortgage in the Agreement may be subject to increase;
- (iv) The Vendor may have the right to alter plans and specifications or substitute materials without notice;
- (v) The purchase price in the Agreement may be increased or adjusted by certain additional costs or charges. (In addition, purchasers are advised that on closing and registration, certain fees and taxes will be payable to the Province of Ontario.)

If the Purchaser cannot identify or understand any of these provisions the Purchaser should discuss them with the Vendor or salesperson.

The Purchaser is advised to consult a solicitor before signing the Agreement.

PLANNING STATUS

2. The current planning status of the land is:

- (i) If the land in the Agreement is within a Plan of Subdivision, the Plan of Subdivision IS /IS NOT registered:
and
- (ii) A building permit for construction of the dwelling IS /IS NOT available for issuance by the municipality after application has been submitted and all municipal review completed.

ONTARIO NEW HOME WARRANTIES PLAN

3. The Ontario New Home Warranties Plan registration number for the Builder is _____, and the enrolment number for the dwelling is _____, (if available).

BUILDER

4. For further information about this Agreement and your home, the Vendor may be contacted at:

_____ (address) _____ (telephone) _____ (attention)

It is recommended that the Purchaser contact the Vendor prior to the closing date to determine that construction is proceeding on schedule and that closing may occur on time.

EXTENSION AND TERMINATION

- 5. (i) If the Vendor cannot close the transaction by the closing date in the Agreement because additional time is required for construction of the dwelling, the Vendor shall extend the closing date one or more times as may be required by the Vendor by notice in writing to the Purchaser as soon as reasonably possible and in any event prior to the closing date or extended closing date, all extensions in the aggregate not to exceed 120 days. However, the Vendor shall not extend closing if the parties have specifically agreed in writing that the Vendor cannot, and the Purchaser does not waive this covenant.
- (ii) The Vendor shall take all reasonable steps to construct the dwelling without delay.

(iii) If the closing date in the Agreement has been extended for 120 days and the Vendor still requires further time for construction of the dwelling, unless subsequent to the closing date in the Agreement the parties otherwise agree, the Purchaser may terminate the Agreement within the 10 days immediately after the 120 days have elapsed by delivering or mailing notice in writing to the Vendor at the address shown above (which notice may also be given between solicitors), and upon the giving of such notice this Agreement shall be at an end and all sums paid by the Purchaser shall be returned without interest or deduction. However, if the Purchaser does not terminate as above, closing shall be deemed to be extended to a date 5 days following completion of the dwelling as required by the Agreement but, unless the parties otherwise agree, not later than a further 120 days after the initial 120 day period. If by this further time the dwelling is not constructed in accordance with the Agreement and if the parties do not otherwise agree, the Agreement shall be at an end and all sums paid by the Purchaser shall be returned without deduction and there shall be no further rights between the parties unless the Vendor is in breach of his covenant in 5(ii) above to construct without delay. If the Agreement is so ended, interest shall be payable on all sums paid by the Purchaser, for the period commencing 120 days after the closing date in the Agreement at a rate 1% below the rate paid by the Province of Ontario Savings Office savings accounts as of the date on which the Agreement ended.

(iv) Notwithstanding any provision to the contrary contained in it, the Agreement shall not be terminated by the Vendor by reason of failure to complete the dwelling as specified in the Agreement within a period of time or by a date specified in the Agreement, extended as above, unless the Purchaser consents to the termination in writing or the Agreement is ended pursuant to 5(iii) above.

(v) Where there is conflict or ambiguity between the Agreement and this Addendum this Addendum shall prevail."

In addition to the Addendum being attached to the Offer to Purchase, the Registrar requires proof thereof by statutory declaration and relies on Section 11(2) and Section 12 of the Act for that demand.

11(2) When a vendor enters into a contract for the sale of a home to an owner for the construction of a home for an owner, the vendor shall deliver to the owner such documentation and notices respecting the Plan as are prescribed by the regulations.

12. A builder shall not commence to construct a home until he has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

We might point out under the definition section 1(n) "vendor" includes builder.

We are not persuaded that the issue of ultra vires is one that should come before and be decided by this Tribunal. It is, in our view, a matter of judicial interpretation, not administrative and belongs more properly in a court of law.

We are, therefore, of the opinion that the Registrar's procedure should have followed the course provided by Section 19(1) of the Act for a proper determination of the issue. It provides as follows:

19(1) Where it appears to the Corporation that any vendor or builder does not comply with any provision of this Act or the regulations, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the Corporation may apply to a judge of the High Court for an order directing such person to comply with such provision and, upon the application, the judge may make the order or such other order as the judge thinks fit.

Nevertheless, since the matter is before us, we are obliged to address the question of whether the offending section and the implications thereof is within the scope of the Act.

We are grateful to counsel, Mr. Campbell for the respondent and Mr. Michael for the builder appellant in providing us with the numerous authorities upon which they rely.

In any determination of the validity of Regulation 728, subsection 12, we must look to the Act and its purpose. It is consumer legislation designed to regulate the building industry in respect of new residential home construction. It also provides warranties to purchasers and provides indemnity for breach of contract or of purchase agreements. The authority for this is found in Section 2 and the following subsections of the Act:

2. (1) The Lieutenant Governor in Council shall designate a non-profit corporation incorporated without share capital under the Corporations Act to be the Corporation for the purposes of this Act.
- (2) Upon its designation, the objects of the Corporation are extended to include,
 - (a) the administration of the Ontario New Home Warranties Plan;
 - (b) the establishment and administration of a guarantee fund providing for the payment of compensation under section 14, whether by the establishment of a fund for the purpose or by contract with licensed insurers;
 - (c) assisting in the conciliation of disputes between vendors and owners; and

- (d) engaging in undertakings for the purpose of improving communications between vendors and owners.

3. The Corporation shall appoint a Registrar who shall perform the duties and exercise the powers given to him by this Act and the regulations under the supervision of the Corporation and shall perform such other duties as are assigned to him by the Corporation.

Mr. Michael, in his lengthy and very able argument submits that the Addendum provides for collateral or extraneous issues outside the purpose and ambit of the Act. He relies on *inter alia*, the decision in Re: Multi-Mall Inc. et al. and Minister of Transportation and Communications et al. (1976), 14 O.R. (2d) 49 (C.A.) where the Minister of Transportation refused to issue land-use permits and access for a proposed shopping centre adjacent to a highway. In that case, the Court found the Minister had exceeded his jurisdiction, exercising it over matters not confined to his mandate and, therefore, for a collateral object.

Mr. Michael further finds support in the case of Roncarelli v. Duplessis [1959] S.C.R. 121, the Quebec Jehovah witness case in which Justice Rand said:

In public regulation the discretion is not absolute or untrammelled and that there is always a perspective within which the statute is intended to operate so that there should be no clear departure from its lines or objects.

and

It has been held that even if made in good faith with the best of intentions, a departure by a decision-making body from the objects and purposes of the statute pursuant to which it acts, is objectionable and subject to review by the courts.

In Re: Metropolitan Toronto School Board et al. and Minister of Education et al; Metropolitan Separate School Board et al, Intervenants (1986), 54 O.R. (2d) 458 (Div. Ct.), Mr. Justice Steele although dissenting set out the proper test to be applied in determining the validity of a regulation:

- (1) Authority therefor must be found within the enabling statute.
- (2) If it is one that is reasonably within the objects and purposes of the statute, it cannot be struck down as invalid unless it conflicts with an explicit provision of any applicable statute.
- (3) It cannot amend or alter the statute.

If this test is to be applied to the offending regulation, we must turn to the Addendum and consider its requirements.

It is essentially an agreement between the vendor and a purchaser of a new home. Paragraph 1 merely provides advice to the purchaser - advice with which the vendor cannot disagree since it relates directly or indirectly to his contract with the purchaser which is covered by the Program.

Section 2 refers to planning stages. Again whether the land is in a plan of subdivision and a building permit is available is of material interest to the parties and the Program.

Section 3. This section merely provides the manner of identifying the builder, the registration number of his company and the home. This relates directly to the Program.

Section 4 simply alludes to the address of the builder where he might be contacted by the purchaser for any further information.

Section 5. Subsections 1, 2, 3 and 4 deal with any delay in construction and possible extensions of time to complete the transaction. This section is both material and relevant to the operation of the Program. Subsection 5 provides that any ambiguity or conflict between the original agreement and the particular provisions of the Addendum shall be governed by the Addendum. The purpose of this subsection is obviously to discourage litigation and clarify misunderstanding between the parties and again is directly related to the purposes and objects of the Program.

The question then is, do any of these provisions offend the statute? We cannot find that they do. Do they meet the test set out by Mr. Justice Steele? In our view, they fall

directly within the provisions of Section 2(2)(c) and (d) of the Act. They, therefore, meet the first test in which authority must be found within the enabling statute.

Do they meet the second test? It is our opinion that if they are within the scope and purpose of Section 2, a fortiori, they are within the objects and purposes of the Act. It has not been argued or suggested, they conflict with the provisions of any applicable statute.

Do they amend or alter the statute? We cannot find the Addendum amends or alters the Ontario New Home Warranties Plan Act. The intention of the Addendum is to provide additional clarification, understanding and security between the builder and his purchaser within the provisions of the Act. It simply adds a statutory contract to an existing one which relates directly to the construction of the home and the time of its occupancy.

We are, therefore, of the view that the Addendum in toto is within the scope and purposes of the Act and the offending Section 12 of Regulation 728 is not ultra vires the Ontario New Home Warranties Plan Act.

Having dealt with the Addendum and the Regulation, we are compelled to address the question of the Registrar's requirement for a statutory declaration which we consider to be the second issue raised.

Is the statutory declaration an integral part of the Addendum so that by holding the Addendum is within the scope of the Act, the declaration must accompany it? We note the form of declaration or proof was not filed or published in the Ontario Gazette.

Section 12 of Regulation 728 requires the registrant to furnish proof to the Registrar that the Addendum forms part of the Agreement of Purchase and Sale. It does not say, however, in what form that proof is to be provided. In other words, it does not demand proof in a prescribed form. The Regulation is silent on the manner by which the Registrar may receive that proof and, therefore, it appears to be left to his discretion to decide as a matter of policy. It is clear that the only manner of proof acceptable to his office is by statutory declaration.

Section 5 of Regulation 728 provides that, "The registrant shall from time to time, at his expense, furnish the

Registrar with such documents relating to the Plan as the Registrar may reasonably require."

The subject document is the statutory declaration. We are not persuaded that a declaration is the only form of proof which may be available to the Registrar. A simple letter from the registrant may suffice. Is this demand therefore reasonable? We think not. The Regulation is explicit only in requiring proof, but does not demand it in any prescribed form. The only reference to the statutory declaration is in a Bulletin dated February 17th, 1987, and previously referred to which provides as follows:

Builders and/or vendors are required to sign and return one copy of the attached statutory declaration stating that they will include the addendum with each agreement of purchase and sale, effective March 2, 1987.

This, however, was only a notice to the trade and the regulation had not been proclaimed at that time.

We are of the opinion that if the Legislature required proof to be given only in the form of a statutory declaration, it would have prescribed the form in the Regulation. By not doing so, the Legislature has left us to assume that other forms would be acceptable. To refuse, therefore, a builder's registration on the pretext that a statutory declaration is the only acceptable evidence is, in our view, not reasonable.

In this context, we quote Mr. Justice Rand in the Roncarelli v. Duplessis case, [1959] S.C.R. 121 at p. 140-141.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which in the absence of regulation would be free and legitimate should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute;

The duty of a commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the discretion of the commission, but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

Considering a public administration that has such power - that is, to refuse to allow a person to continue a calling which would otherwise be legitimate but for regulation - "the grounds for refusing to cancel the permit must clearly be within the scope and purposes of the Act, the duties to serve those purposes and those purposes only.

The decision to deny or cancel such a privilege is to be based upon the weighing of pertinent considerations and not for extraneous purposes.

We are also of the opinion that paragraph 3 of the declaration which reads as follows:

I do further declare that I will ensure that all Agreements of Purchase and Sale entered into by me or by the company from this date forward will similarly incorporate and include therein the said provisions required by the Warranty Program as set out in the said Addendum, or any amendments which may be made thereto.

places an unreasonable and unnecessary onus on the deponent to swear he will perform an obligation which may or may not in the future be required of him.

For these reasons, although we find the Addendum to be within the scope and intent of the Act, and therefore intra vires, we find the statutory declaration an unreasonable and unnecessary document which can be replaced by any other method of proving compliance with the Registrar's requirement pursuant to Section 12 of Regulation 728.

The Applicant will therefor continue to attach the Addendum to all Offers to Purchase and within 30 days of receipt of this decision, provide the Registrar with evidence of his compliance with Section 12, Regulation 728.

In the event, however, the Applicant refuses or fails to do so, by virtue of the authority vested in it under Section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar, Ontario New Home Warranty Program, to carry out his Proposal.

MR. AND MRS. I. OSTRIC

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MacFARLANE, Member

APPEARANCES:

I. OSTRIC, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 12 July 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Mr. and Mrs. Ostric from the disallowance of the Ontario New Home Warranty Program of a claim by the Ostrics to have the wall removed between garage 3 and the other 2 garages of their home located at 432 Freeman Crescent, Oakville and to have appropriate repairs and structural changes made to the garage necessitated by such removal, and to repair a leak in the garage roof. In addition, this is an appeal from an offer of settlement by the Programme for repairs to the interior of the home which settlement is in the amount of \$9,855.00.

With respect to the garage, the Tribunal was informed by Mr. Ostric that he had contracted for a 3 car garage on this home. In March of 1987, after attending at the site and noticing that only a 2 car garage was being constructed, he contacted the builder and was assured this would be corrected. Apparently in May 1987, there was a fire at the site and damage was done to the garage and part of the house. The builder's superintendent indicated matters would be resolved in time for the August 1987 closing. At the time of closing, a Certificate of Completion and Possession was issued dated August 27th, 1987 detailing deficiencies, one of which was that plywood, in the garage roof where the fire had occurred, had been replaced and that a garage door was missing, as well as some painting of the garage. No complaint was made with respect to the third garage having a wall between it and the other two garages.

The question of this wall was raised in the Programme's Conciliation Report dated July 5th, 1988 in which the Programme refused to cover this matter on the basis that it was a design matter rather than defective material and workmanship and, therefore, was a contractual matter as between Mr. and Mrs. Ostric and their builder, but not a warranty item against the Programme.

The Tribunal agrees with this decision of the Programme. On the evidence, Mr. Ostric had ample time to raise this issue, either at closing or subsequently with his builder. There was no evidence presented to the Tribunal as to any defect in workmanship or material and, therefore, if Mr. Ostric has a complaint, he must bring it in a civil court; this is not the forum where any relief can be given to him.

With respect to the leak in the garage roof, the Programme acknowledged this to be a warranted item and undertook to effect appropriate repairs if leaking occurs. This is a proper remedy and Mr. Ostric must inform the Programme and give it an opportunity to inspect and perform repairs if the garage roof is leaking.

Considering the other matters which the Programme found to be warranted and upon which it offered the Ostrics a settlement of \$9,855.00, the Tribunal is satisfied that those items identified as under warranty pursuant to the Conciliation Reports of July 5th, 1988 and September 28th, 1988 were in fact covered by the Programme's warranty and that those items identified as not being under warranty are in fact not so covered.

On this premise, the Programme obtained three estimates based upon the costs to repair the warranted items. These estimates were \$6,243.00, \$7,275.00 (although it was indicated that the cost to remove and store a grand piano, which may be a questionable item under the Programme's warranty, would be supplemental) and \$9,855.00. The Programme opted for the highest estimate and offered this amount to the Ostrics.

Mr. Ostric submitted two estimates: one estimate was for \$25,985.00 plus \$9,550.00 for the garage renovations which latter item the Tribunal finds not to be covered by the Programme Warranty. The second estimate was for \$25,653.00, including the garage plus a further \$5,000.00 for extras relating to the garage and \$8,000.00 for new kitchen cupboards. Unfortunately, the work upon which these estimates were made included substantially more than the work warranted by the Programme, indicating Mr. Ostric's disagreement with the Programme's assessment. The evidence

presented to the Tribunal, however, clearly supported the assessment of the Programme as identified in the two Conciliation Reports. Because the estimates proffered in evidence by Mr. Ostric are so far beyond that identified in the two Conciliation Reports, it makes these estimates of little evidentiary value, particularly as they are not priced on an item by item basis, but are provided on a global contract basis. The Tribunal thus has no independent related estimates upon which it can criticize those estimates obtained by the Programme.

In fact, the Programme produced as a witness, Alan Gilker, who had produced the \$7,275.00 estimate. The Tribunal was impressed with his evidence which indicated that a careful consideration of the repairs necessary, including consultation with flooring contractors, would permit repairs to be made within the quotation which he had given. Under the circumstances, the offer of settlement by the Programme of \$9,855.00 appears to be generous, but the Tribunal is not prepared to set this offer aside.

It should be noted that under Section 6(3) of the Regulations to the Act, an owner is entitled to be paid "the cost of rectification of defective work to the home". While in some cases, the work may be so defective as to require total replacement, which the Tribunal notes is primarily where the Programme and the Ostrics differ, the evidence in this case clearly indicates that this was not necessary in respect to the flooring, kitchen cabinets or master bedroom walls of which the Ostrics complain and upon which their estimates submitted to the Tribunal are based.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal confirms the decision of the Programme dated July 25th, 1988, to disallow the claim in respect to the garage and directs the Programme to make a payment to the Applicants in accordance with the Programme's offer of settlement dated January 31st, 1989, in the amount of \$9,855.00.

DAVID W. PADMORE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
LOUIS A. RICE, Member

APPEARANCES:

DAVID W. PADMORE, appearing on his own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 27 July 1989

Toronto

REASONS FOR DECISION AND ORDER

In this matter, David W. Padmore appeals to the Commercial Registration Appeal Tribunal from the decision of the Ontario New Home Warranty Program dated March 20th, 1989 denying his claim for damages for defective workmanship and materials in the construction at 87 Halfmoon Square in Scarborough.

Padmore was the first owner of the dwelling and took possession on January 4th, 1985. The first intimation of any complaint was received by the Program on December 3rd, 1985 within the first year warranty when Padmore wrote to the Program with a list of fifteen complaints. These seem to have been addressed by the Program leaving only two outstanding and which form the basis for this appeal. One of the complaints is as follows:

11. Bathroom fixtures not installed properly, water seeping down behind tiles.

An inspection was made by the Program's representative on February 28th, 1986. In his evidence, he said the builder had added more caulking to the area, but since then the problem continued and the showerhead and spout were leaking. The advice Padmore received was to refrain from using the shower and to avoid further damage, particularly to the wall opposite the showerhead.

The inspection report resulting from the Program's attendance on February 28th, 1986, contained the observation that "in ensuite shower the water spout and tap are very loose". There is the further note that the caulking around the bathroom floor was unacceptable.

A further inspection was made on June 17th, 1986, and the report of July 1st, 1986 is similar to the previous one.

Complaint: Bathroom fixtures not installed properly. Water seeping down behind tiles.

Observation: This is item 4 on the original A(1). The spout and taps in the ensuite shower are loose and not caulked.

No satisfactory resolution of the matter having been reached, Mr. Bruce Stephens on behalf of the Program made a further inspection on February 15th, 1989 and in his report stated:

Water is entering the walls of the ensuite shower and I believe they will eventually rot, if this condition is not corrected immediately. This condition was recorded on Schedule A(1), Item No. 4, of the Conciliation Report dated March 12, 1986 and on the Reinspection Report dated July 1, 1986, Item No. 3 of Schedule A(1). These reports deal with the taps in the shower stall, which are on the south wall of the ensuite shower. However, the caulking in the south-west north-west and north-east corners of the shower are not adhering to the tile, as well as along the floor at the junction of these walls. When pressure was applied to the north wall in the west corner a 1/8-inch gap was created. Grout was also noted to be disintegrating around all the wall tiles in the lower half of the shower stall. The north wall of this shower wall is an exterior wall. Evidence of poor Homeowner(s) maintenance to the shower stall area was noted at the time of the inspection. Also, no odour was noted. This is not the only shower in this residence.

Mr. Stephens gave evidence which was consistent with the findings in his report, but accented the problem as one also

arising from grout evidently disintegrating caused by lack of maintenance and care. He also pointed out there was evidence of rust caused by moisture through the caulking.

Although it was argued on behalf of the Program, that the documentation suggests this is not a complaint that was made within the first year since it reflects only the taps being defective, we cannot agree. This is obviously a problem with which the homeowner has had to endure since his occupation of the premises, and we find that he asked the Program to address in his first communication of December 5th. The complaint still exists and is obviously within Section 13(1)(a)(i) of the Ontario New Home Warranties Plan Act. We cannot think that a person buying a new home should be advised not to use his shower because the water is seeping behind the tiles when it is clearly the responsibility of the builder to bring it up to the standard for which it was intended to be used. There will, therefore, be an Order directing the Program to re-assess and repair this defect.

The second complaint was not received by the Program until August 26th, 1988, in a letter from Mr. Padmore as follows:

1. Our front porch had developed a rain leak.
Whenever we have any rain activity, the water drips down over the front door.

Another letter followed on September 26th, 1988 in which Mr. Padmore says:

Water leaks down from the porch roof and drips or runs, dependent on the severity of the storm, down the front doorway. If the front door is left open, the water will drip into the front hallway soaking the carpet and tiles.

The Proof of Claim was received by the Program on November 15th, 1988. The claim recites the following complaint:

Water leaks down through the porch roof and drips or runs, dependent on the severity of the storm down the front doorway

and the claim is identical to the letter of September 26th with the further comment that Mr. Padmore also believes that this defect will require extensive brick and facing replacement if it is not corrected now.

The Program 's Field Inspection Report of February 15th, 1989 made by Mr. Bruce Stephens contains the following comments:

This is a two-storey brick veneer structure supported on a poured concrete foundation, with a two-car garage attached to the front left corner. The poured foundation creates a full basement, which has a heating system, hot water tank and items of storage. The Homeowner(s) pointed out an area of water penetration above the front door, but could not specify an exact location. The Homeowner(s) has also installed a glass enclosure to the front entrance. The flashing installed over the front entrance does not appear to have any gaps in the caulking. There was no evidence of water stains on the wood roof rafters above the front entrance or block work of the aluminum soffit. The Homeowner(s) stated that the water penetration would only happen with a southerly driving rain storm. A water test could not be performed due to weather conditions.

Mr. Stephens also gave evidence and stated that he could find no defect in the workmanship and no evidence of water stain.

This claim to be successful must fall within Section 13(1)(b) of the Act which provides:

13(1) Every vendor of a home warrants to the owner

.....

(b) that the home is free of major structural defects as defined by the regulations;

Major structural defect is defined in Regulation 726:

- 1.(o) "major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,
- (i) that results in failure of the load-bearing portion of any builder or materially and adversely affects its load-bearing function, or

- (ii) that materially and adversely affects the use of such building for the purpose for which it was intended.

Mr. Padmore has brought no evidence before the Tribunal of a major structural defect and, on the other hand, the evidence of the Program's inspector can lead us only to the conclusion that the claim against the Program on this issue must therefore be denied.

With regard to the first claim involving the ensuite shower, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal is directed to effect the necessary repairs to the shower and the shower walls of the Applicant's premises.

MR. AND MRS. GARY THIBODEAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
LOUIS A. RICE, Member

APPEARANCES:

MR. AND MRS. GARY THIBODEAU,
appearing on their own behalf

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 3 November 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered May 11th, 1989, disallowing the claim by Mr. and Mrs. Gary Thibodeau based on a defective chimney and/or fireplace in their home.

The Thibodeaus complained of two defects with respect to their chimney:

1. cracks in the flue which resulted from defective workmanship or materials;
2. excessive intake of smoke from the fireplace when a fire was started.

The Ontario New Home Warranty Program rejected both aspects of the claim stating that the Thibodeaus had failed to prove the existence of a defect either in the materials or the workmanship.

At the hearing, however, the New Home Warranty Program accepted that part of the Thibodeau claim dealing with the defects in the flue. This change in position was based on a letter issued

by the Fire Department of Guelph on June 1st, 1989, which attributed the problems with the flue to a deterioration in the cement cap, clearly a defect in materials.

The New Home Warranty Program continued to contest that part of the complaint dealing with smoke penetrating the home through the fireplace, as the Program believed that the Thibodeaus had failed to establish the existence of a defect either in the materials or the workmanship of the fireplace and/or chimney.

It was argued that even though there might be a problem of smoke penetrating the home when the fireplace was in operation, this did not prove the existence of a defect. It was further argued that the burden of proof was on the Thibodeaus to prove the exact cause of the defect before it could be accepted as such.

At the beginning of the hearing, the New Home Warranty Program admitted that the complaint of the Thibodeaus was made within the first year of the warranty and, therefore, that if the Thibodeaus could establish that their complaints constituted a defect in either material or workmanship of the chimney and/or fireplace, their claim would be subject to warranty.

The first witness to testify was Mr. Gary Thibodeau. He declared that the home filled up with smoke when the damper to the chimney was fully open. This happened the first time the fireplace was used in November 1987, and he complained to the builder immediately. The builder did nothing to rectify the problem; Mr. Thibodeau does not remember whether the builder ever actually came to look at the problem. He does remember that the builder simply stated that the construction and materials of the fireplace chimney satisfied the warranty provisions.

Mr. Thibodeau also notified the New Home Warranty Program of the problem with the chimney and/or fireplace, and his belief that there was a defect in either the construction or the materials.

The New Home Warranty Program inspected the fireplace and chimney in October 1988. According to Mr. Thibodeau, they refused all of his claim. As to that part dealing with the intake of smoke, he states that the New Home Warranty Program attributed the problem to down drafts pulling smoke down the chimney rather than to any defects.

Mr. Thibodeau stated that smoke would come into the room and slowly spread throughout the house setting off fire alarms and

causing discomfort. As a result, he had stopped using the fireplace in March, 1988, and did not intend to use the fireplace again until the problem was solved.

Mr. Thibodeau stated that he knows there is a problem with the operation of his fireplace, but does not know its cause. He tried to have an expert visit his home, but the expert failed to show up.

In cross-examination, Mr. Thibodeau stated that he was able to use his fireplace twice a week until March 1988, and that as long as the glass doors to the fireplace were kept closed, there would not be excessive smoke intake. He did not wish to use the fireplace with the doors kept continually closed; and that was why he stopped using it in March of 1988. He has not used the fireplace since that date.

The next witness to testify was Cindy Thibodeau who stated that on one occasion, smoke filling the house woke her up. She also declared that when the doors to the fireplace were closed, there was still some penetration of smoke.

She stated that the builder never came to check on the nature of the problem, but had simply declared on the telephone that the fireplace was "okay".

Mr. Paul Poirier testified on behalf of the Ontario New Home Warranty Program. He declared that he was an inspector/conciliator for the Program and that his experience in construction was as a maintenance supervisor for eight years prior to joining the Program.

It was he who visited the Thibodeau's home and made the report refusing their claim.

While at their home, he asked them to light a fire in the fireplace which, he stated, they did properly. He testified that he saw smoke coming out of one flue and then back into another flue drawing some of the smoke down to the home. He believed that this was because of a down draft.

He stated that the doors to the fireplace were closed during his first visit and were open during the second, and that he saw no smoke of an excessive nature being drawn into the home.

Mr. Poirier gave a number of possibilities for the problems being caused and said that none of them constituted a

defect. He stated that he saw no defects in construction of the fireplace or in the fireplace itself. He believed that the problems could be attributed to a lack of enough air being drawn into the fireplace.

In cross-examination, Mr. Poirier stated that the problem might be solved by extending the height of the chimney.

It is to be noted Mr. Poirier, on his first visit, spent relatively little time inside the home once the fire was started, but immediately went to check the chimney at the top of the home without ever re-entering the home.

Mr. Poirier testified that his understanding of chimneys and fireplaces and their operations came through his experience in visiting different homes. He has taken no formal courses or training in that specific area. He has dealt with some 24 to 36 such complaints over the years, and has read some literature on the problem. He was unable to inform the Tribunal of which books or literature he had read.

In trying to determine what caused the problem, Mr. Poirier did not engage any experts, nor did he ask the builder to bring in an expert.

In argument, Mr. Thibodeau stated that the fireplace does not work correctly for reasons he does not know, and that as a result, he is entitled to have the problems repaired. In essence, he argues that the problems constitute defects in either construction or materials.

The New Home Warranty Program argued that the burden of proof is on the homeowner to prove that a warranty has been breached pursuant to the provisions of the Ontario New Home Warranties Plan Act. The Program went on to argue that the Thibodeaus had failed to prove the existence of a defect in either the materials or workmanship, and therefore they were not covered by any warranty.

In the case of Mark Teitelman, 16 C.R.A.T. Summaries of Decisions, p.178 at p.180, the Tribunal held that the onus is on the owner to satisfy the Tribunal that a warranty has been breached and that the owner has complied with the requirements imposed on him by the statute.

Have the Thibodeaus discharged their burden of proof under the statute? The Tribunal believes they have. The proof

before the Tribunal clearly indicates that there was such a build-up of smoke in the home when the fireplace was in use, that it set off the fire alarm. It was further established that the intake of smoke was so great, that the owners of the home decided to stop using the fireplace rather than to put up with the problems it caused.

The Tribunal takes as a given that fireplaces which are properly installed and which contain good workmanship and proper materials, do not create the type of smoking problem that the Thibodeaus face in the present case.

A fireplace should operate without smoking up a room, whether the doors to it are open or closed.

Based on the facts of how a fireplace is supposed to operate if properly constructed, and the nature of the problems being faced by the Thibodeaus, the Tribunal is entitled to presume that these problems result from a defect in either the construction or the materials. This presumption is based on the principle of *res ipsa loquitur*; the existence of the problem is proof that there must be a defect.

By virtue of this presumption, the Thibodeaus have discharged their burden of proof as to the existence of the defect. If the New Home Warranty Program seeks to refute this presumption, the burden of proof is on them to establish that on the probabilities, the problem did not result from any defect in the construction or materials. This, the New Home Warranty Program has failed to do.

Based on the evidence before it today, the Tribunal believes that the Thibodeaus have established a defect in either the construction or materials of their fireplace and/or chimney, and that they are entitled to have the defect remedied.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim of the Thibodeaus and to effect the necessary repairs.

Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court) by the Ontario New Home Warranty Program. The appeal had not been concluded at the time of this publication.

JAMES R. THORPE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

APPEARANCES: DONALD S. CLARKE, representing the Applicant
CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF HEARING: 26 July 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by James R. Thorpe from a decision of the Ontario New Home Warranty Program disallowing his claim for repairs to his premises at 103 Glenmore Place in Caledonia.

Thorpe is the second owner of a house which was built in 1983; the first owner's Deed being registered on the 2nd of May, 1983. The abstract of title (Exhibit 5) indicated Thorpe received the property by Deed registered on May 31st, 1985.

There are twelve items in issue and these were included in Thorpe's claim against the Program dated October 28th, 1988. Prior to that, correspondence had been received dated May 1988, August 4th, 1988 and September 13th, 1988 from Thorpe and his solicitors.

The Program on November 17th, 1988 replied as follows:

This will acknowledge receipt of your
Proof of Claim form dated October 28th,
1988.

We regret to inform you that only complaints which are reported within the first five years from the original date of possession can be assessed under the terms of the major structural defect portion of the warranty. Our records indicate that the original date of possession was May 2nd, 1983.

The Program is prepared, however, to assess the complaints which you presented in your letter to Mr. Pearson dated May 19th, 1988, albeit the letter was written after the warranty had expired on your home. Only these complaints will be addressed when our technical representative comes out to your home.

A Field Inspection Report was completed on February 8th, 1989 by Mr. Andy Richters on behalf of the Program and the Program's findings were directed to Mr. Thorpe on February 24th, 1989. Mr. Richter's letter of that date concludes as follows:

The reason for this decision with respect to Items 1, 3 and 4 is that the load bearing capacity has not been affected in any way. The cracks in the poured concrete walls are the result of shrinkage which takes place during the curing and drying process.

With respect to Items 5 to 12, these are matters that are beyond the jurisdiction of the Warranty Program five years after possession. The complaints should have been brought to the attention of the Warranty Program within the five year warranty period.

Regarding Item 2, it is evident that the floor slab in the garage has settled and the subsoil beneath it has failed to support its load.

The condition must be corrected and by way of a copy of this letter to the builder, he is so notified. The builder is to contact you within fifteen days of receipt of this letter to make the necessary arrangements for the remedial work. It should be noted that winter conditions will dictate when this work can be completed which could very well be in the Spring.

In his evidence, Mr. Thorpe says he gave the Corporation notice of the structural defects on January 8th, 1988 at the Hamilton office, but received no reply. There is no record of this correspondence being received. In any event, it was not until several months later, in August of 1988, that he wrote to the Program and later filed his Proof of Claim. That appears to be the first intimation of any claim by Mr. Thorpe received by the Program.

The issue is simply whether or not the claim for damages for structural defect was made within the five year period as required by the statute. On all the evidence, we cannot find that it was and, therefore, it must be denied.

It appears the Program has asked the builder to make the necessary repairs to the garage floor and we leave it to them to make their own arrangements with regard to this claim. We cannot, however, make any order since in our view, it was made beyond the statutory limitation.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

CHARLES T. BAKER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
GORDON DRYDEN, Member
WILLIAM J. BINGLEY, Member

APPEARANCES:

CHARLES T. BAKER, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 11 May 1989

Toronto

REASONS FOR DECISION AND ORDER

The Registrar, Real Estate and Business Brokers Act, proposed not to register Charles T. Baker on the basis of his past conduct; namely, because of a number of convictions under the Criminal Code and under the Mortgage Broker's Act over a period of time from 1979 through 1986 dealing with financial matters, fraudulent applications under the Canadian Home Ownership Plan and other matters which, in the Registrar's opinion, dealt with the question of Mr. Baker's integrity and honesty, particularly as many of the charges which resulted in convictions arose in what would be considered to be real estate or real estate related matters.

In addition, questions on his application for registration were only partially answered and again the Registrar was of the opinion that such failure went to the assessment of Mr. Baker's integrity. The Registrar also is of the view that not sufficient time has elapsed since Mr. Baker's last conviction.

The Tribunal cannot fault the Registrar in the reasonable exercise of his discretion in proposing to refuse registration to Mr. Baker. In particular, the decision of the Divisional Court in Re: Brenner (1983) directs the Tribunal that it should only overrule the Registrar if the Tribunal considers that the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that the Applicant would not carry on business with law and with integrity and honesty.

In view of the nature of the convictions and in view of the less than forthright responses on his application for registration, this Tribunal cannot find that the Registrar erred in making his Proposal. This industry is a regulated industry and the Registrar has a duty to the public of Ontario to insist upon a reasonably strict standard for applicants for registration under the Real Estate and Business Brokers Act.

In this case, the convictions occur over a period of time and indicate at best an attitude on the part of Mr. Baker that he has a cavalier disregard for the law. In the opinion of the Registrar, insufficient time has elapsed from the last conviction to indicate a reformation and this Tribunal is not prepared to find that the Registrar has erred in making that decision.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

PATRICK A. DOHERTY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE THE REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
GORDON R. DRYDEN, Member
JOSEPH STRUNG, Member

APPEARANCES;

PATRICK DOHERTY, appearing on his own behalf

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 27 November 1989

Toronto

REASONS FOR DECISION AND ORDER

Patrick Doherty applied for registration as a real estate salesperson on November 11th, 1988. Question 7 of the application is as follows:

Have you ever been convicted under any law of any country, or state, or province thereof of any offence, or are there any proceedings now pending? If yes, give particulars of all such convictions and proceedings on a separate sheet.

In response, Doherty attached to the application a sheet on which he had written:

Criminal Convictions
1980 - simple possession Marijuana - fined \$200
1988 - Assault - Fined \$300
Total charges as of this date

On January 11th, 1989, the Registrar's office conducted a search of criminal records against Doherty finding two convictions together with further charges as follows:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
10 Mar 80 Brampton	Poss of a Narcotic Sec 3(1) Narcotics Control Act	Fined \$100 i/d 10 days
06 Jul 88	Assault Causing Bodily Harm Sec 245.1(1)(b) Criminal Code	Fined \$300 and probation 18 months

<u>Charge</u>	<u>Alleged Offence Date</u>	<u>Scheduled Court Date</u>
Conspiracy to Traffic in a Narcotic (Cocaine) contrary to Sec 4(1) Narco- tics Control Act and contrary to Sec. 423(1)(d) of the Criminal Code	04 June 88 to 28 Jul 88	1st appearance 04 Aug 88 remanded to 19 Sept 89 for trial
Possession of a Narcotic Sec. 3(1) Narcotics Control Act.	27 Jul 88	1st appearance 10 Aug 88 remanded to 19 Sept. 89 for trial

The Registrar proposes to refuse registration to Doherty pursuant to Section 6(b) of the Real Estate and Business Brokers Act, R.S.O., 1980, Chapter 431 in that

- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The grounds for this refusal are:

- (a) The convictions under the Criminal Code and the Narcotics Control Act are serious. The unfortunate assault involved Doherty's wife, but this temper could as easily be directed to a client in future.
- (b) Doherty did not disclose that he is on probation for the recent assault matter for eighteen months until January 8th, 1990 and it is the practice of the Registrar not to register anyone who is currently on probation.
- (c) Doherty did not disclose what in fact were four pending narcotics charges, although he had appeared on these charges on August 4th, 1988 and they are set for trial on March 22nd, 1990. These are two trafficking charges, one for the possession of cannabis resin and one for the possession of cocaine.
- (d) Doherty's notation "Total charges as of this date" was misleading and untrue.
- (e) Doherty further failed in answering question 4(b) of the application to disclose a conviction of impaired driving under the Criminal Code of Canada effective February 29th, 1976 and a three month suspension of his driver's licence from March 16th, 1976.

This matter had been set down for November 21st, 1989, but the Tribunal adjourned that hearing to November 27th to allow Doherty to obtain counsel.

Mr. Gordon Randall has been the Registrar under the Real Estate and Business Brokers Act since July 1988 and has had some 21 years of detailed real estate experience in his career. He reviewed the grounds for refusal and expressed his concern that Doherty had not been honest and thorough in his answers. The

Registrar must be able to rely fully and without question on the answers given on all applications in order to protect the public interest.

The failure of an applicant to properly answer can allow applicants to be registered to the possible jeopardy of the public.

Doherty had acknowledged that the facts set out in the Proposal were correct both as to convictions and as to charges. He is not currently and never has been registered under the Act.

The Registrar is most concerned about the temperament of the Applicant which a recent serious assault conviction shows and about the answers in the application itself. The failure to show current probation is of itself vital since probation is a bar to registration in the practice which the Registrar follows. The failure to refer to recent serious narcotic charges cannot be excused by the Registrar, and the failure to inform as to the suspension of driver's licence also shows disregard for the process. The Registrar acknowledged that if the only conviction had been for the narcotics possession some nine years ago, that of itself would not be a bar to registration today.

In addition, the reference to "total charges" is untrue. Since Doherty achieved 96% on his third test, the Registrar is confident that the questions were fully understood and that an attempt was made to deceive.

Marian Hetherinton is a registration officer with the Ministry and on February 2nd, 1989, she interviewed Doherty and his proposed broker, David Hume of Century 21 Kingsbury Real Estate Limited.

At the meeting, the charges were acknowledged and the several items not earlier disclosed were admitted. Doherty had not referred to the charges because they were pending and two realtors had told him that only convictions had to be disclosed, she said. Doherty was very keen to be registered, and had done very well on his course of study.

Gary Thompson is an investigator with the Registrar's office and confirmed the details of the meeting of February 2nd, 1989 when he also was present.

Patrick Doherty explained that he was not aware of the

necessity to show the term of probation on his list and would have done so if he had known. He also confirmed that the word "charges" was not correct and that he should have used the word "convictions".

If he had known that being on probation would block his registration, he would not have spent five weeks of his summer vacation in 1988 to complete the course in which he placed very nearly the top of his group with an average of 92%.

Since he believes himself innocent of the four narcotics charges and expects that they will be dropped against him, he looked on them with some confidence as less important than others might. Doherty had proposed that today's hearing be adjourned until after March 22nd, 1990. If the hearing today had been adjourned, the probation term would have been over and perhaps the charges against Doherty may have been dismissed so that Doherty's views of the situation would have been bolstered.

On cross-examination, counsel for the Registrar took Doherty through parts of the textbook for the real estate course to show the exposition of the need to be accurate and complete in the application process.

In his argument, counsel for the Registrar reminded the Tribunal of the principles set out by the Divisional Court in the case of R.G.Brenner vs. Registrar of Motor Vehicle Dealers heard on March 9th, 1983 and unreported.

(This case will be included in a complete companion volume to the 1989 CRAT reports, together with all other Divisional Court decisions and Supreme Court Orders made since 1970.)

In that decision, Mr. Justice Southey wrote:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have

directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

And he further stated:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

The principle of full and correct disclosure on any application is set out in the decision of Gilford Garage Service Limited and Theodore Ambury (1982) 11 C.R.A.T. 52 at p.53.

The Tribunal is of the opinion that the application is basic to the

formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

In the decision of Peter Kodis (1985) 14 C.R.A.T. 187, the Tribunal commented on the failure of an applicant to list pending criminal charges and certain convictions as follows at p. 190:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle

underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman, there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

That approach was reinforced in the opinions further expressed by the Tribunal in the decisions of Orval David Bradt (1987) 16 C.R.A.T., p.202 and Cynthia Hayes (1988) 17 C.R.A.T., p.231.

The issue of sufficient time passing after a criminal conviction was considered in the decision of Israel Jakobs (1987) 16 C.R.A.T. 223 where it was acknowledged that, "A criminal record of itself, is not necessarily a bar to future registration", but that

In the Tribunal's opinion, on the evidence before it, not enough time has elapsed between Mr. Jakobs' last conviction and his application for registration to show that, indeed, Mr. Jakobs has turned over a new leaf and that his past conduct will not be repeated in the future. In these circumstances, registration subject to terms and conditions is not appropriate.

And finally, the decision of Michael J. Beauregard (1987) 16 C.R.A.T. 197, set out the view of the Tribunal where a

conviction and pending charges for narcotics trafficking were not included in answer to question 7, when it was stated:

When asked why he did this he responded during the hearing by saying, with simple candour, that he wanted to be registered as a real estate salesperson and felt that the registration sought would not be granted if the Registrar knew of his criminal record and the charges pending.

The Tribunal is bound to conclude that the subsequent conviction in respect to the charge of trafficking in heroin for profit and the earlier Break and Enter conviction disclose a propensity to disregard the law as well as dishonesty. The attempt to deceive the Registrar shows a lack of integrity. The Tribunal has no choice but to uphold the Registrar's Proposal.

The Tribunal has given consideration to Mr. Doherty's situation, and notes his nineteen year employment record, his taking of counselling for the assault on his former wife, his abandonment of alcohol and his exemplary record of support for his former wife and their two children without any court order requiring him to do so. The high marks on his course show his ability and his keen desire to be a registered real estate salesman.

However, because he is on probation and has serious criminal charges to face and because he did not disclose on his application, these and other matters to the Registrar, this Tribunal cannot say that the Registrar is incorrect in refusing registration at this time. Mr. Doherty can re-apply for registration in several months when a full disclosure of his then current circumstances may lead to a different view by the Registrar.

By virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

HENRY J. EMSON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES;

JAMES K. deROUX, representing the Applicant

JANE WEARY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 25 July 1989

Toronto

REASONS FOR DECISION AND ORDER

In this appeal, Henry J. Emson appeals to the Tribunal from the Proposal of the Registrar of Real Estate and Business Brokers to revoke his licence as a real estate salesman.

Emson applied for registration under the Act on January 22nd, 1988, which was granted and has since that time been employed as a salesman with Knowlton Realty Limited, a firm specialising in commercial properties.

In the fall of 1988, it was brought to the Registrar's attention that Emson's background was not fully considered when his application was granted even though Emson had made full disclosure in his application. In his evidence, Mr Randall pointed out a mistake was made by his office and that Emson would not have been registered had full consideration been given to the application.

The Registrar's reasons for the Proposal now to revoke the Applicant's licence are as follows:

In my opinion, Emson's registration
should be revoked as:

(a) the past conduct of the
Registrant affords reasonable

grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and

(b) having regard to his financial position, the Registrant cannot reasonably be expected to be financially responsible in the conduct of his business.

It appears that Emson had previously been registered under the Travel Industry Act, but this registration was terminated in 1985 due to the failure of the company. The Applicant had included this in his application and had also disclosed his corporate bankruptcy in 1977 and discharge in 1988. The Registrar has raised no issue regarding disclosure in Mr. Emson's application.

Mr. Randall has indicated to the Tribunal, his concern is based on the background of the Applicant which he observes leaves much to be desired. There is the matter of the personal and corporate bankruptcy which, although occurring in 1979 and 1980, left in its wake some unsatisfied claims. There is the claim against the Compensation Fund of between one and two million dollars arising from Mr. Emson's operation of the travel agencies, along with his partners. These are losses which cannot be retired by Mr. Emson.

The Registrar is further troubled by the apparent financial instability of the Applicant, by the public perception if he continues to be registered and by the possible danger to the public in Mr. Emson's conduct of business. He points out that the Applicant's financial history indicates bad judgment in financial affairs. These are serious concerns and must be addressed, particularly in view of the fact there is no compensation fund available under the Real Estate and Business Brokers Act.

Mr. Emson in his evidence was quite candid about the financial difficulties incurred by his various enterprises; Shamrock Tours, Chieftain Tours and Chieftain Holidays all operated by Air Bridge, a company with which he was associated as an officer and director. He pointed out that he had ceased employment with this company in September 1982 and although the company collapsed a year later, he did not believe they were in financial trouble at the time of his departure.

He was also the sole shareholder and director of Jetlink

from September 1982 until it ran into financial difficulties in September 1985. The reasons for the collapse of this company he said were some bankruptcies, the high degree of competition and pending litigation with Quebec Air. He is now apparently involved in a lawsuit with Quebec Air to which he gave a personal guarantee that indicated the company was, in his opinion, indebted to him.

In 1987, he enrolled in the Real Estate and Business Brokers course and was advised his registration was granted in March of 1988. Since then he has been employed by Knowlton Realty. Engaged now only in the sale of commercial real estate, the Applicant appears to be doing well and is considered an asset to the company by Mr. Kellam, the Branch Manager of the Toronto office who gave evidence on his behalf.

This is a difficult case and a troubling one, involving perhaps the protection of the public on the one hand and the livelihood of the Applicant on the other.

Miss Weary, counsel for the Registrar, very succinctly sums up the objections to the continued registration of the Applicant - the personal and corporate bankruptcies in which he was involved, the legislation aimed at the protection of the public, the claims against the Compensation Fund which are of considerable magnitude and the public perception - all of which, she contends, are ample grounds for revocation. The several cases, she has cited, clearly support her argument.

On the other hand, the submissions of counsel for the Applicant advance the main issue, in his opinion, that of the absence of fraud, and dishonesty and lack of integrity. Emson left Chieftain Travel a year before its collapse. He points out, Emson could do nothing to prevent the demise of Jetlink with its unfortunate implications; he gave full disclosure to the Registrar in applying for a licence and finally, if the licence was to be revoked, the Registrar should have acted more quickly. Over a year and a half has elapsed since the registration was granted.

We are of the view that Emson was a victim of his own carelessness, in perhaps relying on other partners and also of the changes in a volatile market remembering the severe recession of 1981 and 1982 which was not foreseen. He may not be a very good businessman accounting for the failure of Jetlink in 1985, but we find no dishonesty or lack of integrity in the evidence. Bad judgment in financial affairs does not reflect dishonesty or lack of integrity.

He is not registered as a broker and, therefore, does not have the same responsibilities. It is true that the Registrar would have refused him a licence in March of 1988, had the matter been reviewed at that time. The same situation, however, does not obtain today. Emson has been gainfully employed, with some reasonable success, for the past eighteen months without a complaint either by his employer or by the Registrar. The public seem to have been served with honesty and integrity. It is for these reasons, we cannot now deny this man continued employment and there will be an Order directing the Registrar to refrain from carrying out his Proposal.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs that the Applicant's registration shall continue under the following terms and conditions:

1. The broker undertakes to report to the Registrar on a quarterly basis on the performance and conduct of the Applicant.
2. The Registrar shall approve any change in brokers.
3. Prior to renewal of his licence in March 1990, he must have completed those courses which are reasonably required by the Registrar to have been completed successfully.

MAUREEN FORD

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
MICHAEL E. LERANBAUM, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

MELVYN GREEN, representing the Applicant

STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 25 November 1988

Toronto

REASONS FOR DECISION AND ORDER

The Applicant has required this hearing for a review of the Proposal of the Registrar dated November 7th, 1988, proposing to refuse to grant her registration as a real estate salesperson.

Ms. Ford is a 41 year old single mother of three children. She is the owner and operator of her own business, "Mo's", a skin care retail outlet located on Queen Street West in Toronto. Ms. Ford's mother was a successful real estate agent in Edmonton for some fifteen years and has encouraged Ms. Ford to become a real estate agent.

In her application for registration dated June 14th, 1988, Ms. Ford disclosed the fact that there were a number of drug related criminal charges outstanding against her, including a number of counts of "traffic in cocaine". All the counts relate to events alleged to have occurred on April 14th, 1988. As of the date of the hearing before this Tribunal, none of these charges had been finally dealt with in the District Court and it was not expected that the charges would be tried for many months to come.

Ms. Ford has no record of any prior criminal convictions, and she has never before been charged with any criminal offence.

The Registrar testified before the Tribunal as to the steps taken by his office to confirm that the charges disclosed in the application were substantially those laid and outstanding against Ms. Ford. No other witnesses were called on behalf of the Registrar.

The Tribunal heard no evidence relating to the substance of the charges themselves.

Under the Real Estate and Business Brokers Act (the "Act"), an Applicant is entitled to registration except where one of the grounds for refusal set out in subsection 6(1) of the Act has been made out. In this case, the Registrar seeks to rely upon the ground that is set forth in clause (b) of subsection 6(1), which provides:

- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal does not consider the fact that there are criminal charges outstanding against the Applicant to constitute evidence of the Applicant's "past conduct". Charges are simply allegations and nothing more until proved or admitted in a court of law.

The only evidence of the Applicant's past conduct that was put before the Tribunal was the testimony of the many character witnesses called to testify on behalf of Ms. Ford, all of whom certainly describe her past conduct in very positive terms.

This case is indistinguishable, in terms of the narrow issue to be decided, from the Mann case reported at 1987 CRAT Volume 16, page 245. The reasons for the majority decision in Mann apply in this case as well. The fact that criminal charges have been laid does not, in and of itself, form the basis for proving anything about the Applicant's past conduct. No other evidence having been presented to the Tribunal which would support the Registrar's refusal to register, the Applicant is entitled to registration.

The Act permits the Tribunal to attach terms and conditions to any registration that will give effect to the purpose of the Act. The Applicant has indicated her willingness to have reasonable terms and conditions imposed.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the following terms and conditions will apply to the registration:

1. That John Schweigel, the broker-manager of R. Cholkan & Company Limited, the intended broker-employer of the Applicant, provide the Registrar with an agreement in writing whereby he agrees to report in writing every month as to the Applicant's performance as a real estate salesperson and, in particular, with respect to her compliance with the law, and that such monthly reports be provided to the Registrar pursuant to such agreement.
2. That in the event that the Applicant transfers to another broker-employer, that such broker-employer be notified of and provided with a copy of this decision of the Tribunal, and that that such broker-employer provide the Registrar with an agreement in writing whereby that broker-employer agrees to report in the same manner as in paragraph 1 above, and that such monthly reports be provided to the Registrar pursuant to such agreement.
3. That these reporting requirements continue to apply until such time as the pending charges against the Applicant are disposed of in a court of law.
4. That the Applicant immediately advise the Registrar of the disposition of the charges against her and the nature of the disposition.
5. That in the event that the Applicant is convicted of one or more of the pending charges, the registration of the Applicant shall be reviewed by the Registrar and the Registrar shall be

entitled, in his discretion, to suspend or revoke the Applicant's registration with such suspension or revocation to take immediate effect, and in such event the Applicant shall not trade in real estate pending any further hearing by this Tribunal that the Applicant may request to review such suspension or revocation as the case may be.

ALLAN MARK GILROY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
HELEN J. MORNINGSTAR, Member
A. DONALD MANCHESTER, Member

APPEARANCES;

MARK A. KLAIMAN, representing the Applicant

ALVIN TORBIN, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 4 May 1989

Toronto

REASONS FOR DECISION AND ORDER

Allan Mark Gilroy applied for registration as a real estate salesman on the 16th of August, 1988.

The application contains a question - expected to be answered truthfully - "Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement?" The Applicant answered in the affirmative as follows: "Re Section 6 I was previously convicted of driving a motor vehicle while having a blood alcohol level in excess of .08 milligrams. This occurred in the Spring of 1985". Although correct, the information was subsequently found to be incomplete.

Mr. Gilroy's record submitted as Exhibit 9 and tendered by the Halton Regional Police Force disclosed the following:

<u>Date/Court</u>	<u>Offence</u>	<u>Disposition</u>
1981-04-10 Oakville, Ontario	(1) Poss. of restricted drug Section 41(2) F & D Act	(1-2) \$100 I-D 10 days on each charge
	(2) Poss of a narcotic Section 3(1) NC Act	

1985-07-02	(2)	Poss. of narcotic	\$100
Oakville, Ontario		drug	I-D 10 days
		Section 3(1) NC Act	
1987-03-03	(3)	Poss. of narcotic	\$1500
Oakville, Ontario		drug	
		Section 4(1) NC Act	
		(Halton Regional	
		Police Force 34622)	

Mr. Cavanagh of the Registrar's office upon receiving this information asked the Applicant to confirm the record in writing and to advise the Registrar why he had failed to disclose these convictions. Gilroy replied as follows and attached the Halton Regional Police record to his letter:

Registrars office
555 Yonge Street, Floor #3
Toronto, Ont.
M7A 2H6

To whom it may concern

This is my, Allan Mark Gilroy, disclosure statement concerning my criminal record. In the past I have had four criminal convictions. The attached Halton Regional Police Force abstract identifies the conviction date, the offence and the disposition.

This letter is separate from my application because I feel this information could be detrimental to my employers image and to my own professional career.

If you have any further questions please do not hesitate to call me at 842-8690.

Sincerely yours

Allan Mark Gilroy

Unfortunately, Gilroy made no mention of his convictions under the Highway Traffic Act which he was obliged to do in the

application. A search of the records of the Ministry of Transportation by the Registrar's office revealed the following:

85/04/23	driving excess 80MG
86/04/23	failing to have an insurance card
86/04/28	permit use of plate not authorized for vehicle
86/08/08	suspended re unpaid fine
87/04/09	speeding 75 kms in 60 km zone
87/07/02	unnecessary noise
87/11/12	driving while licence is suspended

As a result, the Registrar has issued a Proposal to refuse registration to the Applicant on the grounds that it is his belief the Applicant will not carry on business in accordance with law and with integrity and honesty. Gilroy now appeals to this Tribunal for an Order for registration.

In his evidence, Mr. Randall, the Registrar points out that his initial reaction is to refuse registration where the failure to disclose past conduct on the application is discovered. He takes the position that he is entitled to depend upon the information on the application as revealing the true situation, since it is impossible to examine every application in detail and check on its veracity. In this view, the previous cases before this Tribunal support him. He further observes that the ethical requirement is an integral part of the real estate course and the conduct of business.

Quite apart from the issue of disclosure, the Registrar is concerned about the offenses themselves and the continuing nature of the offenses as demonstrating a disregard for the law. In his view, the Applicant appears to be prepared to disregard the law to gain an end.

Gilroy, a highly intelligent man of twenty-six, gave evidence of his real estate background having passed his courses at Sheridan College with marks of 88% on segment one, 92% on segment two and 90% on segment three. He appears to be an aggressive individual who will not remain at the bottom of the ladder. How he will climb that ladder, however, is the disturbing issue. He has come to the Tribunal with recommendations from a Mr. Hutchinson of Freeman Real Estate, with whom he worked as a research assistant for a short time, and from his bank manager who acknowledges the satisfactory repayment of several loans.

Mr. Klaiman, his counsel, points out the Applicant may

have had a reckless youth, but has since seen the error of those days, the last three years being without blemish. He further points out that the Applicant has not been convicted of any offenses involving fraud or dishonesty; those under the Highway Traffic Act particularly not being offenses involving moral turpitude.

On the other hand, Mr. Torbin on behalf of the Registrar submits the application provides a test for the Applicant to prove his honesty and integrity, and Mr. Gilroy has failed it. He is, he says, a man likely to act in his own best interests as opposed to those of his clients.

The numerous authorities cited by Mr. Torbin entirely support his position and for this Tribunal to direct the Registrar to refrain from carrying out his Proposal would, in our view, be utterly opposed to the weight of the authorities.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

GARY M. GORDON

APPEAL FROM A DECISION OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES;
W. BRUCE AFFLECK, Q.C., representing the Applicant
JANE WEARY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF
HEARING: 24 May 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the Applicant, Gary M. Gordon, as a real estate salesman pursuant to Section 6(1)(b) of the Act because his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

On September 7th, 1988, the Applicant applied for registration and made full disclosure of his criminal record. This record is as follows:

<u>Date & Place</u>	<u>Charges</u>	<u>Disposition</u>
Oct. 5/56 Deseronto	(1) Poss. of Stolen Property Sec. 297(A) CC (2) Unregistered Fire- arms Sec 90 CC	(1) 2 yrs. susp. sent. (2) 1 yr. susp. sent. conc.
July 9/57 Napanee	Theft under \$50 Sec. 280 CC	7 days
Sept. 19/57 Belleville	BE & Theft Sec.292 CC	6 mos. def. & 3 mos. indef.

Oct. 15/57 Napane	(1) BE & Theft Sec. 292 (1)(B) CC (2 Chgs.) (2) Theft under \$50 Sec. 280(B) (2 Chgs.)	(1-2) 9 mos. def. and 3 mos. indef. on each chg. conc. & conc. with sentence dated 1957-09-19
May 14/59 Toronto	Poss. of Stolen Property	3 mos.
Aug. 4/64 Meaford	False Pretences Sec. 304 (1) (A) CC	Susp. sent. & probation for 1 year
Oct. 22/70 Pickering	Assault CBH Sec. 231 (2) CC	Fined \$200 & costs i/d 30 days
Dec. 20/71 Cobourg	Forcible Confinement	3 mos. & proba- tion for 3 years
Dec. 21/71 Cobourg	Poss. of Unregistered Restricted Weapon Sec. 91 (1) (A) CC	3 mos. & proba- tion for 3 yrs. conc. with sent. dated 1971-12-20
May 22/73 Napane	Assault CBH Sec. 245 (2) CC	Fined \$500
May 26/81 Oshawa	(1) Common Assault Sec. 244 CC (2) Point Firearm Sec. 84 CC	(1-2) Susp. sent. & proba- tion 3 yrs. on each ch.

The Applicant also disclosed an outstanding judgement for arrears of child support showing a balance of \$3,980 owing as of August 9th, 1988. It was agreed that the balance of the principal amount of \$3,980 was paid in September 1988; although a claim of outstanding interest on the arrears in the amount of \$3,182.30 remains at issue.

Mr. Thomas Clute, an Assistant-Registrar trainee, reviewed the history of this application for the Tribunal. The concerns of the Registrar centred on the criminal record of the Applicant and on the outstanding judgement. There was also a previous minor bankruptcy which was disclosed and the Discharge obtained removed any concern which the Registrar might have on that as a reason to refuse registration.

These matters were discussed with the Applicant at a hearing on October 20th, 1988, and the Registrar issued the Proposal to refuse registration on January 13th, 1989.

Gary Gordon is an alcoholic. Born on July 11th, 1940, he is now 48 years old and has been a crane operator at a steel company in Whitby since November, 1977, and also conducts a successful part-time horse business.

Mr. Gordon reviewed his criminal record and showed how it was divided into two portions. He explained that various offences against property occurred from 1956 to 1964 when he was from the age of 16 to 24, and that the violent offences occurred from 1973 to 1981; and that all of these offences resulted from an alcohol dependency which he was unable to control.

However, eight years passed until his conviction in 1981 of assault and pointing a Fire Arm, and another eight years have now passed without any further incident.

Gary Gordon carries antabuse with him and takes it whenever he may be exposed to the stress of events when alcohol would be available. He has not had an alcoholic drink since 1981 and presented a letter from his doctor to that effect. He can take one-third of a pill as needed, but a heart murmur prevents daily use so that he assumes the responsibility for monitoring himself.

Under cross-examination, Mr. Clute acknowledged that the criminal record and the dependence on responsible usage of antabuse were the real concerns of the Registrar, since Mr. Gordon might not take his protective pill and could, accordingly, jeopardize the interests of his clients.

Gary Gordon has had a relationship with Sheila Courrier since 1973. She was the victim of the 1981 assault, and became sufficiently confident that the shock of the event had changed Gary Gordon, that they were married in 1985. Over 23 years, Sheila Courrier has developed her own real estate brokerage and employs some 60 salespersons in two Remax franchises in Eastern Toronto. She has just bought out her former partner who had signed the application for registration for Gary Gordon and who knew of Gary Gordon's criminal record.

She has been successful and Gary Gordon acknowledged that he likes this lifestyle and the acquaintances that he has made through his wife's success. She believes that he has become a changed person who is responsible, quiet and both mentally and physically mature. She trusts him and is confident as to their future together.

Four character witnesses told of their social and business relations with Gary Gordon dating over periods from 14 to 25 years. They all knew him as a drinker, as a reckless youth, and even as an alcoholic. In each case, they spoke of a changed person who for eight years now, never drinks, is responsible to his wife and friends, has a steady job and runs a successful horse farm business, and has a stake in the future.

The Tribunal has to decide on this application through a consideration of the following principles:

1. As was stated in the case of Downey (1988) CRAT Volume 16, p.216 at p.218:

The Tribunal's first and foremost concern in considering a possible registration under the Act must be and is the protection of the public interest.

2. The Tribunal recognizes that the Registrar has the responsibility to determine whether an Applicant is acceptable for registration as a real estate salesperson. In reaching his decision, the Registrar must follow the provisions of Section 6 of the Real Estate and Business Brokers Act which states that an applicant is entitled to registration by the Registrar except where, "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

3. This Tribunal may intervene to reverse the Registrar's refusal to register an applicant - but it may only do so where the Registrar has made an error in reaching his decision. In the absence of such error, the Tribunal will direct the Registrar to carry out his Proposal not to register an applicant

This principle was clearly enunciated in the case of Richard G. Brenner heard by the Supreme Court of Ontario (Divisional Court) on March 9th, 1983. The Court held at page 4 of its judgement:

The effect of section 7(4) is that the tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in

concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under section 5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional discharge.

Here the Tribunal must ask if the Registrar erred in concluding that the past conduct of the Applicant afforded reasonable grounds to believe that he would not carry on business in accordance with law and with integrity and honesty.

The Tribunal finds that the Registrar's decision is wrong and the views of the Applicant's criminal record and the judgement and, as well, the expressed concern about possible misuse of the reliance on antabuse are not reasonable.

The criminal record has been explained as the activities of a fatherless youth with an inability to handle alcohol and a pattern of property offences as a young man, and with two violent offences in 1973 and in 1981. The victim of that latter offence is now Gary Gordon's wife. The Tribunal accepts her evidence,

along with his and that of his four witnesses, that rehabilitation has occurred over the past eight years and that a new life is developing for Gary Gordon.

The principles to be considered for reform and rehabilitation are set out in the case of Lloyd Ripani heard on December 8th, 1988, and released on February 14th, 1989.

In that case, the Tribunal states:

The recent conduct of the Applicant is also to be given some weight, particularly in view of the concepts of reformation and rehabilitation espoused by our society and the general public to whom the Registrar is responsible. Present society, particularly since the enactment of the Canadian Charter of Rights and Freedoms in 1982, now propounds the principle that when a sentence has been served, if there is sufficient evidence of true reformation, then the individual should be entitled to return to a responsible position in the community. The Tribunal cautions that it is not suggesting there should automatically be registration of applicants after a specified time, rather these principles should be applied to the circumstances of each application: the nature of the offence, the sentence imposed, acceptance of responsibility for the offence by the applicant, conduct of the applicant, evidence of moral reform.

And, further, after discussing several cases, the Tribunal notes:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be

permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then certain terms and conditions will be imposed. But even with these general principles, there is an overriding principle; namely, that in protecting the public interest, the Registrar must treat each case as an individual matter. This does not mean that the Registrar may act capriciously or inconsistently. Rather it means that while the Registrar must treat each individual equally as is set out in section 15 of the Canadian Charter of Rights and Freedoms, nevertheless, there may be certain circumstances which require the Registrar to refuse registration or to impose terms in order to protect the consuming public.

This Tribunal has in these reasons indicated some of these considerations as they affect the applicant for registration, but there may be others which affect the community and which require the Registrar not only to be fair to the applicant, but also to demonstrate certain standards of moral integrity of registrants to the public at large. Thus matters such as the effects of financial loss to a large segment of the community, a breach of trust, or a callous disregard for people or the laws of this province and country are all matters to be considered by the Registrar.

We believe that the Applicant has met the requirements of each of those principles and that registration should be granted to him, subject to certain terms and conditions. We find that the past conduct of Gary Gordon does not afford reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal, but to register Mr. Gordon subject to the following terms and conditions:

1. For this period of registration, Mr. Gordon's registration shall be with Remax Executive Realty Inc. under the supervision and monitoring of Sheila Courrier, the broker of record, and such registration shall continue during the period unless changed with the consent of the broker and the acceptance of the Registrar; and any substituted broker during this period shall agree with the Registrar to be bound by the obligations imposed therein.
2. For this period of registration, the broker, Sheila Courrier, shall supervise all real estate activities of Mr. Gordon, including approving his advertising, listing agreements and sales agreements and contacting all purchasers and vendors for whom Mr. Gordon arranges a completed agreement.
3. The broker shall report on a quarterly basis to the Registrar on the comportment and behaviour of Mr. Gordon and stating that Mr. Gordon is fully satisfying the Real Estate and Business Brokers Act. These quarterly reports will begin on September 30th, 1989 and continue until the expiration of Mr. Gordon's registration period, and the Registrar may in his sole discretion extend the quarterly requirements into the following registration period or periods.

ANDREAS J. HACKNER

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

STEPHEN P. MARTIN, representing the Registrar under the
Real Estate and Business Brokers Act

No one appearing for the Applicant

DATE OF

HEARING: 15 May 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Andreas J. Hackner from the decision of the Registrar, Real Estate and Business Brokers Act, refusing to grant him registration as a real estate salesman.

Mr. Hackner had advised the Registrar by telephone that he would not appear today and wished his appeal discontinued. In the absence, however, of any further documentation reflecting Mr. Hackner's intentions to discontinue his appeal, we could not treat it as having been abandoned and, therefore, proceeded to hear evidence adduced by the Registrar.

We note from the exhibits introduced that Mr. Hackner was convicted in the Supreme Court of Ontario on November 23, 1987, for breach of trust and sentenced by Mr. Justice Callaghan on December 14, 1988 to twenty-two months in reformatory and twenty-four months probation. He was released on August 5, 1988 and is presently on parole. When that period expires on October 14 next, he will serve twenty-four months on probation.

The Registrar is of the view that it is inappropriate for an applicant to be registered under the Act while on parole, it being inconsistent with the spirit and intent of the legislation. We are also of that opinion, which has much precedent.

There is also the record of some twelve convictions under the Criminal Code since 1977, which, if the appeal were to be seriously pursued, would demand more than the passing attention of the Tribunal. It is, however, clear that Mr. Hackner considers it premature to continue the matter further and we by virtue of the authority vested in it under section 9(4) of the Real Estate and Business Brokers Act direct the Registrar to carry out his Proposal.

HENRY KATZ

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
JAMES A. CATHCART, Member

APPEARANCES:

HARVEY J. KATZ, representing the Applicant

ALVIN TORBIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 15 November 1988

Toronto

REASONS FOR DECISION AND ORDER

Mr. Katz has applied for registration as a salesman under the Real Estate and Business Brokers Act, R.S.O., 1980, Chapter 431 (the "Act").

The Registrar has issued a Notice of Proposal to refuse registration to Mr. Katz on the grounds that he is not entitled to registration under section 6 of the Act in that:

- (a) having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business; and/or
- (b) the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The particulars upon which the Registrar relies are set out in the Notice of Proposal and are supplemented by a letter dated November 4th, 1988. The Applicant does not dispute the particulars.

Mr. Katz was a solicitor specializing in the area of

real estate and mortgages for some twenty-six years. In February of 1980, Mr. Katz was disbarred by The Law Society of Upper Canada (the "Law Society") following a finding by that body's discipline committee that Mr. Katz was guilty of professional misconduct.

The evidence before the Tribunal and admitted by the Applicant established that during the period March 1979 to October 1979, some \$270,000 was misappropriated from clients' trust funds. During this time, Mr. Katz filed a false "Form 2" report to the Law Society in respect of his trust accounts. He was also found by the Law Society to have borrowed money from clients over a number of years without fully protecting their interests.

In April of 1980, the Applicant was convicted of some four counts of theft by conversion and one count of fraud over \$200.00. He was sentenced to a prison term of six years on one count and various concurrent sentences in respect of the remaining counts. The Applicant was fully paroled in 1982 and his parole term expired in 1986.

The Applicant was petitioned into bankruptcy in January 1980. A conditional discharge was issued on the 28th day of July 1987 in which it was found that:

- (a) the Applicant continued to trade after knowing himself to be insolvent;
- (b) the Applicant brought on or contributed to his bankruptcy by rash and hazardous speculations;
- (c) the Applicant, within three months preceding the date of his bankruptcy when unable to pay his debts as they became due had given an undue preference to one of his creditors; and
- (d) the Applicant, was guilty of fraud or fraudulent breach of trust.

The Applicant was discharged from bankruptcy on the 28th day of January, 1988.

The Tribunal heard testimony from the Assistant Secretary of the Law Society in respect of claims made to the Law Society's Compensation Fund by Mr. Katz's former clients.

As at October 25th, 1988, the total amount paid out by the Compensation Fund to Mr. Katz's former clients was \$554,674.21. The Law Society also paid out a substantial amount in respect of claims made by clients of the former partner of Mr. Katz. On June 24th, 1987, a judgement, consented to by Mr. Katz, was issued by the Supreme Court of Ontario in favour of The Law Society of Upper Canada in the sum of \$913,650.07.

A letter dated September 21st, 1987 written by the solicitors for the Law Society and addressed to Mr. Katz's solicitors was filed with the Tribunal. It states in part as follows:

This will also confirm the informal agreement between Mr. Katz and The Law Society to the effect that he will keep the Society or its counsel apprised of his financial circumstances on a regular basis. In return for same, the Society will refrain from enforcing the Judgement in such a way as to adversely affect his employment. The Society is interested in Mr. Katz recovering his financial health in order that its Judgement can be retired in full. The agreement does not mean that the Society will never garnishee his wages or take other active steps against him. Rather, it means that the Society wishes to recover its Judgement in a manner consistent with Mr. Katz obtaining and maintaining gainful employment.

In his application for registration under the Act, Mr. Katz disclosed his disbarment by the Law Society, disclosed his April, 1980, criminal convictions and disclosed that he was a discharged bankrupt. He omitted disclosure of certain driving offence convictions which occurred in December, 1970. The Tribunal is prepared to accept that such omission was an oversight. However, Mr. Katz also failed to disclose the aforementioned outstanding judgement in favour of the Law Society. In fact, the question "Are there any unpaid judgements outstanding against you?" on the application form is answered in the negative. While the evidence indicates that the application was completed by Mr. Pope, the Applicant's proposed broker-employer, Mr. Katz testified that he carefully reviewed the application before signing it. Mr. Katz testified

that he felt his negative answer to the question as to unpaid judgements was accurate in view of his arrangement with the Law Society as described in the September 21st, 1987, letter. The Tribunal finds this explanation not plausible, particularly coming from a person who was a practising solicitor for over twenty-six years.

Copies of a number of letters written in 1980 and 1981, by friends and associates of Mr. Katz and directed to the National Parole Board in connection with his application for parole at that time, were filed with the Tribunal. The authors of these letters all comment in very positive terms on Mr. Katz's character and reputation.

Following his release from parole, Mr. Katz worked in an auto parts warehouse, in a men's wear store and as warehouse manager of his brothers' automotive parts company. When that business was sold in 1987, he obtained work as a counter salesman in another auto parts firm. He took the courses which are a prerequisite to registration as a real estate salesperson and achieved excellent examination results. Mr. Katz testified that he wants to re-establish his identity and that he sees real estate sales as the only way that he can accomplish this and re-acquire some dignity and meaning in his life.

Mr. Pope, the Applicant's proposed broker-employer, has been a broker for two years and operates as Re/Max 4 Star Realty Inc. in Hamilton, Ontario. He has known Mr. Katz for some twenty-five years. Mr. Pope made a claim to the Law Society Compensation Fund to recover some \$50,000 which he says was given to Mr. Katz in trust for use in connection with some possible future transaction. The Compensation Fund disallowed the claim. There are 16 salespeople working out of Mr. Pope's brokerage. He explained that the "Re/Max system", unlike a conventional agent-broker arrangement which operates on the basis of a split commission, requires agents to pay a fixed office charge each month. His agents receive 95% of the commissions earned. He is prepared to take on Mr. Katz and opined that he considers Mr. Katz to be a brilliant man and someone who can be trusted. He also indicated that Mr. Katz would have a "head start" because he knows so many people in Hamilton. He is prepared to work closely with Mr. Katz, but has no specific plan for supervision as yet.

Mr. Katz's counsel urged the Tribunal to consider Mr. Katz's more recent past conduct over the events leading to his disbarment, bankruptcy and incarceration in 1980. Counsel argued that, notwithstanding that there is an unpaid judgement

of over \$900,000 outstanding against Mr. Katz, that Mr. Katz has been meeting his current obligations and is capable of meeting his obligations in the conduct of his business as a real estate agent. It was submitted by counsel that Mr. Katz has paid his debt to society and should be given another chance.

The Tribunal dealt with a similar fact situation in the case of Michael J. Delaney (1984) CRAT Volume 13, p.262. In that case, the applicant for registration as a real estate salesman was also a disbarred solicitor who had misappropriated some \$180,000 from his clients' trust funds. He was convicted of 19 charges of breach of trust and sentenced to 15 months incarceration concurrent on each charge. There were unpaid judgements outstanding against Delaney totalling in excess of \$50,000. The Registrar proposed to refuse the registration and the Tribunal supported such refusal. It is appropriate to cite from the Tribunal's reasons in that case at length:

The Registrar and Tribunal have an obligation under the Statute. The Statute is one which the Legislature has deemed specifically necessary for the protection of the public. Those who wish to enter the business of real estate must meet certain criteria. Their entitlement to entry into that vocation is limited by certain exceptions, one of which is where "the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".

It is a most significant factor that the Appellant has been disbarred from a profession in which the Code of Ethics has as an initial heading "Integrity" and in which Rule #1 reads:

"The lawyer must discharge his duties to his client, the court, members of the public and his fellow members of the profession, with integrity"

(emphasis Tribunal's)

The commentary on the rule, (which cannot be controverted), is as follows:

"Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession."

Now the Appellant is seeking entry into a vocation in which the Legislature has spelled out as one of the criteria, in addition to that, for example, expected of all vocations, "in accordance with the law" also that of acting with "integrity". The standard is just as high for those who seek entry to the real estate vocation as it is to the legal profession. Indeed, those who practise the vocation of real estate do count themselves as professionals and subscribe to the same high standards.

If a fundamental quality of the practise of law is "integrity", the Legislature has also expressed that same quality, which must be considered therefore fundamental of those in the business of real estate.

The Appellant has indicated that in his opinion the risk to the public from a salesman is not very great. However, it is to be noted that the Legislature has not, in setting down its criteria, differentiated between the various types of registration. Again the Tribunal reiterates that the ethic related to the breach of trust of which the Appellant was found guilty is the very basis of entry into the vocation sought.

The financial obligations outstanding by the Appellant are formidable. Nothing has changed with respect to them in two years.

There is no doubt that the attitude of the Appellant in his personal life since the conviction and disbarment has been without further improper action. It has been the belief of the Tribunal that it is what is expected of all citizens living within our society.

The Appellant enjoys high favour with many of those who have had dealings with him in a personal and business way. Such opinions are not to be disregarded, and are commendable. But the responsibility lies with the Registrar and the Tribunal.

In the case of Gary B. Williamson (1987) CRAT Volume 16, p.266, the Applicant had been convicted of nine counts of fraud. The events giving rise to the convictions occurred some seven and a half years prior to the date of the hearing before the Tribunal (although he was not convicted until 1985). In that case, the Tribunal was also asked to consider more recent past conduct rather than focusing on earlier misconduct. The Tribunal stated in its reasons for decision:

The Tribunal must also give careful consideration to the fact that the charges of which the Applicant was convicted in 1985, and for which he served a prison sentence, arose directly as the result of his actions in breach of the public trust. The regulation of the real estate industry is motivated precisely by the need to protect innocent members of the public from being victimized by persons who would breach the public trust.

.....

In the present case, while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

The Tribunal must also take into account the potential damage to the public's perception of and confidence in the industry which the registration of persons convicted of fraud, particularly in the context of a situation as notorious as the Argosy collapse, would have.

The Tribunal has also considered the fact that there are alternative career paths available to the Applicant which would permit him to continue his rehabilitation and allow him to achieve the success and job satisfaction that he desires, options which do not require that he be placed in a position of public trust.

In the case before us, the Tribunal finds that the two grounds for refusing to register the Applicant which are relied upon by the Registrar are supported by the facts in evidence before the Tribunal. The reasoning of the Tribunal in the Williamson and Delaney decisions cited above also has application to the facts before the Tribunal in this case.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

NEIL M. KENNEDY

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
JAMES A. CATHCART, Member

APPEARANCES:
DAVID COLE, representing the Applicant
ALVIN TORBIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 3, 6 January 1989 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the applicant, Neil Kennedy, as a real estate salesman because his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The facts are as follows:

On April 11th, 1988, Kennedy applied to become registered as a real estate salesman. The application was filed as Exhibit 5.

In response to question 7 of the application as to whether the applicant had ever been convicted of an offence, the Applicant responded "Yes" and went on to state on a separate page:

"I was convicted in 1986 of possession of hash oil. Any information need (sic) please contact Shelly Hazard (Parole Officer) (259-4654.)"

Neil Kennedy

On May 3rd, 1988, the Registrar had a criminal record

search conducted against Kennedy which revealed the following conviction against him:

<u>Date and Place</u>	<u>Charge</u>	<u>Disposition</u>
04/05/70 (Nfld)	Assault CBH	Fined \$20.00 i/d 5 days
04/08/72 (Toronto)	Possession of Restricted Drugs	Absolute discharge
11/05/83 (B.C.)	Possession of a Narcotic for the Purpose of Trafficking - Sec 4(2) NC Act	4 years
26/06/86 (Nfld)	Conspiracy to Possession of Narcotics for the Purpose of Trafficking	2 years and 6 months consecutive to sentence serving
17/06/87		Paroled

The Registrar subsequently decided that the Applicant should not be registered as a salesperson under the Act because:

- 1) He failed to disclose his criminal convictions in his application, which constituted the furnishing of false information.
- 2) The Applicant had a long history of convictions under the Criminal Code of Canada.
- 3) The most recent convictions in 1983 and 1986 were for crimes of a serious nature and
- 4) The Applicant has not demonstrated that he has been rehabilitated.

Mr. Kennedy was the first to testify. He stated that he had not intended to mislead in his answer to Question 7; rather, he had referred the reader to Miss Hazard to be absolutely certain that the full record of his convictions was

disclosed. He claimed that he was frightened to leave anything out and, as a result, included the referral to the Parole Officer rather than listing the various convictions in his answer.

It is to be noted that when being cross-examined, Mr. Kennedy was very capable of outlining the crimes for which he had been convicted. With respect to the 1983 conviction, he stated that he had been offered a payment of \$50,000.00 to unload a boat containing narcotics. He said that the sum of \$50,000.00 was "a lot of money."

Mr. Kennedy was also able to set out the circumstances leading to his conviction for possession of narcotics for the purpose of trafficking in 1986.

It is to be noted, as well, that with respect to the 1970 conviction, Kennedy first stated that he had forgotten about it. Later on, he declared that he did not believe that he had to reveal the conviction because he thought he had been pardoned. Thus, Mr. Kennedy's memory appeared to be better than he claimed.

Finally, Kennedy admitted that he had committed the 1986 offence while still on parole from his conviction in 1983.

The next witness to testify was Mr. Joe Kavanagh who acts as an Administrative Officer in the Registrar's Office. He was asked to review Kennedy's application because of his admitting to a criminal record in answer to Question No. 7.

Mr. Kavanagh testified that when he discovered that Kennedy had four convictions, he summoned him to a meeting on May 25th, 1988. At the meeting he told Kennedy that he had failed to make full disclosure; as a result, he could not be accepted for registration as a salesman.

Mr. Kavanagh testified that it was his impression that Mr. Kennedy had not been totally forthright in answering Question 7 in the hope that the Registrar would not carry out further checks as to other possible convictions.

Mr. Randall, the Registrar Real Estate and Business Brokers, testified that Mr. Kennedy did not make complete disclosure. He stated that Kennedy had been convicted of serious crimes dealing with greed and that the length of his imprisonment showed the seriousness of these crimes. He went on to say that the public looks at the registration of a

salesman as conferring respectability and allowing the public to trust in that salesman. For this reason, it was important to only register those persons who could be expected to satisfy the public trust.

Mr. Randall also stated that it was standing policy of the Registrar to not grant registration to people on parole.

The final witness was June Russell, a Branch Manager for Royal LePage Real Estate Services Limited. She testified that she was a friend of Mr. Kennedy's girlfriend and had known Mr. Kennedy for approximately 18 months.

She referred Mr. Kennedy to another manager when he sought a position with Royal LePage. She knew of Kennedy's criminal records, as did the manager to whom she referred Mr. Kennedy. More particularly, Miss Russell knew that Mr. Kennedy had been convicted twice of possession of narcotics for the purpose of trafficking and that Mr. Kennedy had served time in jail.

She also stated that Royal LePage helps prospective sales people fill out their application forms. Had she helped Mr. Kennedy, she would have contacted the Parole Office before answering Question 7 to assure a complete answer.

Finally, she said that she would be prepared to hire Mr. Kennedy.

The Tribunal must decide whether the Applicant is entitled to registration or has become disentitled by virtue of Section 6 of the Real Estate and Business Brokers Act. The Applicant is entitled to registration unless the Registrar, who has the burden of proof, satisfies the Tribunal that the past conduct of the Applicant is such that it affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The standard of proof to be met by the Registrar is not as high as in a criminal prosecution.

This Tribunal discussed the standard of proof in the case of Vito Luigi Calogero (1987) CRAT Volume 16, page 206 at page 211:

...The criterion followed by the Tribunal in the past is set out in Re: Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2d), p.470. The

decision of Mr. Justice O'Leary reads in part as follows:

"In all cases, before reaching a conclusion of fact, the Tribunal must be reasonably satisfied that the fact occurred, and whether the Tribunal is so satisfied will depend on the totality of the circumstances, including the nature and consequences of the fact or facts to be proved, the seriousness of the allegation made, and the gravity of the consequences that will flow from a particular finding.

The Tribunal is also mindful of the Decision in 1983 of the Divisional Court in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen wherein that Court held that "...unless the Tribunal can find that it [past conduct] does not, [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his proposal."

The Tribunal believes that Kennedy has not acted with honesty and integrity in the past and that the cumulative effect of his past conduct affords reasonable ground for belief that he will not carry on business in accordance with law and with integrity and honesty in the future.

The two elements which leads the Tribunal to this conclusion are:

- 1) The failure of the Applicant to answer Question 7 of the application form honestly and forthrightly;
- 2) The Applicant was convicted of serious criminal offences in 1983 and 1986. These convictions demonstrate a continuous course of unacceptable conduct.

We shall deal first of all with the failure to make complete disclosure in response to Question 7. The question itself is very clearly worded and directs the Applicant to list separately each of the convictions for which he has been convicted. Instead of listing his convictions, Kennedy wrote only of his conviction in 1986 which he described as possession

of hash oil. He then invited the reader to refer to Shelly Hazard for any information.

His answer not only failed to list the far more important conviction in 1983, but also disclosed only the least serious part of the offence for which he had been convicted in 1986. Before the Tribunal, both Mr. Kennedy and his witness, Miss Russell, stated that the conviction had been for trafficking as well. Under the circumstances, the Tribunal finds it implausible that Mr. Kennedy left out the word "trafficking" when describing his conviction in 1986.

Far more grave was Mr. Kennedy's failure to list the 1983 offence. This was a most serious crime involving a large amount of money. There was no acceptable reason for not listing this conviction.

To the Tribunal it seems that when Mr. Kennedy in his answer referred the reader to Shelly Hazard, it was only in connection with the 1986 conviction. There was nothing in the answer itself to make one suspect that there were any other convictions.

At the very least, when filling out his answer, Mr. Kennedy should have indicated that he had been convicted of a number of convictions and that, for further details, the reader should contact Shelly Hazard. Instead, the answer he gave hid the true gravity and number of convictions and was of a nature to mislead.

It takes no special skills or education to simply list the convictions and the approximate year of conviction. If Mr. Kennedy had really wanted to make full disclosure, he could have answered the question with information provided by Miss Hazard. In any case, while before the Tribunal, he demonstrated that he was able to list his convictions when asked. Mr. Kennedy knew, or should have known, that his answer was misleading. If he had intended to make full disclosure, he would certainly have asked the reader to contact Miss Hazard to obtain information "with respect to other convictions".

Mr. Kennedy had the obligation and responsibility to clearly set out the convictions for which he had been condemned. Numerous cases have emphasized the importance by an applicant of making full disclosure and not relying on the Registrar to obtain the facts. These cases have also held that failure to make full disclosure constitutes reasonable grounds for refusing registration because it demonstrates a lack of integrity and honesty.

In the case of Orval David Bradt (1987) CRAT Volume 16 page 202, the Applicant disclosed that he was convicted of conspiracy to traffick in cannabis marijuana and sentenced to three years in jail, but he failed to disclose that his driving licence was suspended twice. The Tribunal held at page 204 of the judgement:

The Tribunal has carefully reviewed the evidence. While the answers contained in the 1985 application were not false, they were not the whole truth either. Whether the answers were deliberately phrased to mislead or were worded with little regard to need to disclose full particulars is not clear. In either case, Mr. Bradt was not completely and fully honest in his answers. In this, he showed a lack of integrity.

The facts of the present case are very similar to those of the case of Bradt.

In the case of Gilford Garage Service Limited and Theodore Ambury (1982) CRAT Volume 11, page 52, Ambury also partially answered the question of whether there were any convictions against him. He disclosed one conviction without listing numerous other ones. The Tribunal at page 53 underlines the importance of the application form and its being properly answered:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgement.

The Tribunal also found that the Applicants must have known of the various convictions against them because they "were recent or of a nature that remembrance must be taken for granted." The Tribunal then went on to state in deciding that the Applicants should not be granted registration.

The Legislature has set out that registration under the Act is related to a business which is to be carried on in accordance with law and with integrity and honesty. The Tribunal finds that the completion by the applicants of the applications is such as to give reasonable grounds for belief that in respect of these applicants there would be the contrary.

A similar judgement was rendered in the case of Peter Kodis (1985) CRAT Volume 14, page 187 where the Tribunal again pointed out the importance of the application form and its reflection on the integrity of the applicant. At page 190, the Tribunal held:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The present case of Mr. Kennedy leads this Tribunal to the same conclusion: he failed to make honest and complete disclosure, as a result of which the Registrar was entitled to refuse him registration.

The second element concerns the convictions against

the Applicant in 1983 and 1986. The crimes he committed were so serious, that it is incumbent upon the Applicant to prove his rehabilitation. The Tribunal does not believe that a sufficient period of rehabilitation has elapsed to establish that Kennedy will now conduct himself with honesty and integrity.

Our Tribunal dealt with this issue in the case of Kenneth Chartrand heard July 13th, 1988. Mr. Chartrand was convicted of conspiracy to import narcotics and sentenced to seven years incarceration. The Tribunal held as follows on the second page of their judgement:

This Tribunal approves the decision of the Tribunal both in the first and second Sunderland cases, that a period of rehabilitation is necessary to establish that an individual no longer lacks honesty and integrity and will conduct his business in accordance with the law. It is also the view of this Tribunal that the period of sentence, including any parole period within that time should reasonably be considered as the minimum rehabilitation period. This is not to say that in certain circumstances and with respect to certain crimes a lesser period may be appropriate to assess effective rehabilitation, but certainly in the case of crimes involving financial or fiduciary matters, great care should be taken by the Tribunal in permitting registration of a salesman in such a profession as that governed by the Real Estate and Business Brokers Act. This was clearly the view of the Tribunal in the Gary Brian Williamson case 16 CRAT (1987) p. 266, which stated at page 271:

...while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding

that the Registrar has erred in refusing to grant the registration.

The Tribunal must also take into account the potential damage to the public's perception of and confidence in the industry which the registration of persons convicted of fraud, particularly in the context of a situation as notorious as the Argosy collapse, would have.

This Tribunal is prepared to consider, in its responsibility to the public of Ontario that trafficking in narcotics or conspiring to so traffick is equally likely to affect the public's perception of the industry and confidence in it.

The Tribunal in that case also approved the statement from the Giovanni Giannini case, 14 CRAT (1985) p. 179:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women...Only persons of complete trustworthiness should be considered suitable for registration...

(emphasis added)

The elapsing of sufficient time from the last conviction to demonstrate that the Applicant has truly "turned-over a new leaf" was also required in the cases of Israel Jacobs (1987) CRAT Volume 16, page 223 at page 226 and of Stuart A. Montgomery heard by this Tribunal on July 14th, 1988. In the case of Montgomery, it was held on page 2:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal

conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

Only after Mr. Kennedy has demonstrated over a reasonable period of time that he has been rehabilitated can he make an application for registration. By his own admission, he is still on parole; this would not bar him from being registered, but given the serious nature of his former crimes together with the failure to disclose honestly his past convictions, the Registrar acted properly in refusing his registration.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

ALLAN R. LIZOTTE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
HARRY HAYES, Member

APPEARANCES:

ALLAN R. LIZOTTE, appearing on his own behalf

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 5 January 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to revoke the registration of the Applicant, Allan R. Lizotte, as a real estate salesman. The reason given by the Registrar for his Proposal is that the past conduct of the registrant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The facts, which are not in dispute, are as follows:

On May 11th, 1983, Lizotte applied for registration as a salesperson under the Act. A copy of the application was filed as Exhibit 6. Lizotte was granted registration under the Act and subsequently applied for, and was granted, renewal of his registration on July 15th, 1985 and again on June 19th, 1987. The July 15th, 1985 renewal was filed as Exhibit 7 and that of June 19th, 1987, as Exhibit 8.

In response to question 7 of the application and renewals as to whether the Applicant had ever been convicted of an offence, he responded, "No".

In February 1988, the Registrar had a criminal record search conducted against Lizotte; this search revealed the following convictions against him:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
13/04/71 Toronto	Public Mischief	Susp sent & 1 yr probation
27/10/78 Toronto	Poss of Stolen Property Over \$200	Fined \$150. i/d 15 days
18/07/80	Poss of Stolen Property Under \$200	Fined \$200. i/d 14 days

At the time of his initial application in May, 1983, and his applications for renewal of registration in July, 1985, and June, 1987, in response to number 4(b) of the application "have you ever had a licence or registration of any kind refused, suspended, revoked or cancelled? If yes, give full particulars. NOTE: "Of any kind" includes driver's licence or any other licence, permit or registration issued by any government body.", Lizotte responded, "No."

Pursuant to a driving record search conducted against Lizotte, it was revealed that Lizotte had had his driving licence suspended effective December 9th, 1982.

At the time of his initial application in May, 1983, and his applications for renewal in response to number 6 of the application "Are there any unpaid judgments outstanding against you? If yes, submit a copy of each judgment. State amount outstanding and repayment arrangements on separate sheet.", Lizotte responded, "No."

In July 1988, pursuant to a search made of Writs of Execution in the name of Lizotte, it was revealed that a Writ of Execution in evidence of an unsatisfied judgment against Lizotte had been issued. The date of the Writ was November 19th, 1987 and was to enforce payment of support and custody obligations in the amount of \$4,742.00.

Mr. Joe Kavanagh, who reviews applications which present problems for the Registrar's office, testified that when he received the applications and learned of the false information with respect to question 7, he summoned Lizotte to a meeting at his office. Lizotte at that time answered that he did not believe that his conviction in 1970 constituted a criminal conviction because the judge had not ordered a fine or imprisonment.

As to the two convictions for possession of stolen property in 1978 and 1980, Lizotte claimed that he did not remember them at the time of the various applications.

Mr. Gordon Randall, the Registrar of Real Estate and Business Brokers, testified that he was concerned greatly by the falsifications contained in Lizotte's application and renewal applications. These constituted a breach in trust and trust is one of the cornerstones of the real estate profession. He stressed the necessity for complete honesty in completing applications.

He went on to state that he did not believe Lizotte's excuse of a memory lapse, because the real estate course which Lizotte successfully passed, requires a great deal of memory work. He also referred to Mr. Lizotte's letter of August 22nd, 1988, filed as Exhibit 1, which demonstrated a clear ability to remember facts of long ago.

In answer to certain questions asked by the Tribunal, Mr. Randall stated that the crimes in themselves, while important, were not major ones such as theft, violence or breach of trust. Had Mr. Lizotte answered truthfully to all the questions, the Registrar might very well have granted registration.

Mr. Randall also testified that his office had received no complaints with respect to Mr. Lizotte during the five years that he has acted as a real estate salesperson.

Ms. Susan Wiseman appeared as a witness for Mr. Lizotte. She said that she was a manager at Darryl Kent Real Estate Limited and supervised Mr. Lizotte. She has known him for three years and finds him conscientious and hard working. He was even asked to present a seminar within the firm. He has also taken outside courses to improve himself.

In the course of his work, Mr. Lizotte has taken deposits from clients and given advice to them. She has received no complaints from any clients on the manner in which Mr. Lizotte has carried out his functions. Ms. Wiseman stated that Darryl Kent Real Estate Limited would retain the services of Mr. Lizotte should his registration not be revoked.

Mr. Lizotte was the last to testify. He declared that the public mischief charge of 1971 was for drinking under age and being rowdy. He was seventeen years old.

As to the two charges of possession of stolen goods, Mr. Lizotte said that the first involved a coat for his wife valued at under \$150 and the second, three or four dresses. Mr. Lizotte declared that he is up-to-date in the payment of support to his wife and, as well, that he has learned his lesson about filing applications containing false information.

Counsel for the Registrar has argued that the Registrar is justified in revoking the registration of Lizotte because of his past conduct and the failure to disclose the information required in the applications and their renewals. Counsel cited the case of Alexander Bodon (1984) CRAT Volume 13, page 247, in which the Tribunal refused to grant registration because of false statements in the application.

The Tribunal notes that in the case of Bodon, the crimes he failed to disclose were far more serious: they involved tampering with trust funds and the removal of trust funds for his own use. Mr. Bodon had also been charged with three counts of evading payment of income tax and two counts of filing false income tax returns. He was imprisoned for his various offences.

The criminal convictions of Mr. Lizotte did not involve any jail sentences and the fines levied were very small. Mr. Bodon also finally declared bankruptcy, owing his creditors \$134,780.00. In the case of Mr. Lizotte, there was only one judgment against him for \$4,742, which judgment has been fully repaid. At the time of mailing his application, Mr. Lizotte did not realize that the Court Order constituted a judgment.

Counsel also cited the case of Peter Kodis (1985) CRAT Volume 14, page 187, and the case of Frederick Bullock heard on November 24th, 1988. The case of Kodis involved far more serious crimes in which the Applicant had been incarcerated and that of Bullock involved some 78 charges of theft over \$200 for which he served a jail sentence.

The Tribunal believes that Mr. Lizotte gave false information in his applications and in their renewals. This constituted a grave offence which reflects very seriously on Mr. Lizotte's integrity and honesty.

The Tribunal shares the opinion of the Tribunal in the Bodon case "that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of the applicant to be registered. He is entitled to a

full disclosure of all facts--all the relevant past conduct, upon which to base that judgment." (page 258)

The importance of the application was also treated in the Kodis case at page 190:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

While the Tribunal believes that the past acts of Lizotte of making false declarations were serious breaches that require sanction, the Tribunal does not believe they warrant the revocation of his registration. The Tribunal is mindful of the decision of the Divisional Court in 1983 in the case of Brenner v. Registrar of Motor Vehicle Dealers and Salesmen where the Court held that "...unless the Tribunal can find that it [past conduct] does not [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his proposal."

The paramount duty of the Tribunal is to protect the public; the public must be able to deal with salesman who are honest and in whom they can trust. In the present case, Mr. Lizotte has demonstrated his honesty in carrying out his function as a real estate salesperson. In addition, he has been charged with no crime since 1980. As stated previously,

the crimes in themselves were not major. The failure to disclose them on his application, however, was a grave wrongdoing. It is important that the Applicant realise he must complete it truthfully.

Under the circumstances, the Tribunal believes that the Applicant should be suspended as a real estate salesman for a period of three months.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal, but to suspend Allan Lizotte's registration for a period of ninety days beginning February 1st, 1989 and ending April 30th, 1989. Mr. Lizotte at the hearing chose February 1st as the date on which the suspension is to commence. During this period, Mr. Lizotte may carry on no function of a real estate salesman. Without restricting the preceding, Mr. Lizotte may not go to his real estate office or have any contact whatsoever with clients or prospective clients.

When Allan Lizotte's registration is reinstated, it shall be subject to the following terms and conditions:

He shall deliver to the Registrar's office on a semi-annual basis the following documents:

1. A current sherrif's certificate evidencing no further executions against the registrant.
2. A current police report evidencing no further convictions; and
3. A signed statement by the Applicant attesting to there being no charges, of any nature, pending against him.

These conditions shall apply for a period of two years following the lifting of the suspension.

ROBERT BRUCE NIMMO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
A. DONALD MANCHESTER, Member

APPEARANCES:
DAVID ZELDIN, representing the Applicant
STEPHEN P. MARTIN, representing the
Registrar of Real Estate and Business Brokers

DATE OF 26 January 1989
HEARING: 17 March 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse to grant the registration of the Applicant, Robert Bruce Nimmo, as a real estate salesman. The reasons given by the Registrar for his Proposal are that:

1. the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and
2. having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business.

No evidence was led with respect to financial responsibility and this ground for refusal was dropped.

The facts are as follows:

On or approximately on October 3rd, 1988, Nimmo applied for registration as a real estate salesperson under the Act. A copy of the application was filed as Exhibit 9.

Attached to the application were six pages, including the following:

1. A letter from Harold Frankel Trustees & Receivers Incorporated to the Applicant, Nimmo, dated March 8, 1988, being a letter enclosing a copy of the Absolute Order of Discharge of Bankrupt.
2. Notes entitled "Re: Impaired Charge; Mischief" and dated the 29th day of September, 1988 and signed by the Applicant.
3. A page of handwritten notes being a list of dates and places of employment.
4. A cover page for an Absolute Order of Discharge of Bankrupt.
5. Copy of a Summary Administration Order from the Supreme Court of Ontario in Bankruptcy dated Monday, the 18th day of January, 1988.
6. Examination marks from the Ontario Real Estate Association.

The Applicant received an average of 90% on the exams.

Question 3(b) of the application asks: "Have you ever had a registration of any kind refused, suspended, revoked or cancelled? If yes, attach particulars." To this question, the Applicant answered in the affirmative and wrote in "Driver's licence".

In fact, the Ontario Driver's licence of the Applicant was suspended from the fourth month of 1982 through to the seventh month of 1986 and was again suspended from the ninth month of 1986 through to the twelfth month of 1986. Mr. Nimmo testified that the licence was suspended because of his non-payment of certain traffic offence tickets.

Question 4 of the application for registration asks: "Has the Applicant ever been involved in any bankruptcy proceedings?" Mr. Nimmo answered in the affirmative and attached to the application a copy of the Absolute Order of Discharge of Bankrupt from the Supreme Court of Ontario, dated the 18th day of January, 1988.

The proven liabilities of the bankruptcy amounted to less than \$20,000.

Question #6 of the application asks, "Have you ever been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement." Mr. Nimmo answered in the affirmative stating, "Impaired Driving, mischief". He then attached a page to the application for registration dated September 29th which reads as follows:

1. Re: Impaired Charge; Mischief

The matter dates back to April 20, 1987, it was to be heard in June 1988, but put over until December 1988. But this matter will not likely proceed on this date, if it does I am confident that the charges will be dismissed (sic). Should you have any further questions please contact my lawyer Mr. Bruce Hillyer in Burlington, Ontario.

The Registrar had a criminal record search conducted against Nimmo; this search revealed the following convictions against him:

<u>Date and Place</u>	<u>Charges</u>	<u>Disposition</u>
June 8, 1984 Edmonton Alberta	(1) Assault Peace Officer, Sec. 246(1)(A) CC	(1) Fined \$125 i/d 14 days
	(2) Fail to Appear Sec. 133(5) CC	(2) Fined \$75 i/d 7 days
Nov. 5, 1985 Edmonton Alberta	Drive with more 80 Mgs. of Alcohol in Blood, Sec. 236 CC.	Fined i/d 20 days
Dec.15, 1987 Brampton	(1) Personate Peace Officer Sec. 119 CC	(1) Fined \$200 i/d 10 days
	(2) Public Mischief Sec. 128 CC	(2) Susp. sent. and prob.1 yr.

It is to be noted that Mr. Nimmo disclosed the most serious of the charges against him in answering Question #6, but failed to make disclosure of prior convictions as required by the application form.

The first witness to testify was Mr. Tom Clute, the Assistant-Registrar. He stated that on October 19th, 1988, he attended at a meeting which had already begun between Mr. Nimmo and Mr. Randall. As he arrived, he saw Nimmo returning with a list setting out his criminal convictions which he had just prepared at the Registrar's request.

Later on that morning at 11:45 a.m., Nimmo returned to the office saying that he had gone to R.C.M.P. headquarters in order to have certain fingerprints matched up. This match-up was necessary because Mr. Nimmo had claimed that an assault for which he was convicted was carried out by another person using his identity card. If this were the case, then the fingerprints at the R.C.M.P. headquarters would not be the same as his. At the headquarters, he had been told that it would take a year to do the match-up.

He phoned Mr. Clute later in the day to apologise, saying that he had been on the phone with the Edmonton police which reminded him of the 1981 criminal conviction.

The next important contact with Mr. Nimmo was on December 14th, 1988, when he informed Mr. Clute that he had been found guilty of one charge of careless driving and that the six other charges had been withdrawn. The Registrar's office checked with the Court and found that Mr. Nimmo had been convicted of one count of dangerous driving and not careless driving. The other charges had indeed been dropped.

The next witness was Mr. Al Malinauskas, an O.P.P. constable since 1975. He testified that on April 20th, 1987, he was on patrol in the breathalyzer unit when he saw Nimmo's car going the wrong way on Highway 401 at Highway 10. An accident occurred in which Mr. Nimmo was injured. When Constable Malinauskas reached the scene, he noted that Nimmo was impaired. He got his breathalyzer equipment and went to the hospital where he found Nimmo acting in a threatening and violent manner. He had to be tied to a stretcher. The Constable testified that Nimmo threatened to spit in his face. He administered the breathalyzer test and Nimmo was charged with impaired driving.

The Constable stated that on December 14th, 1988, there was a plea bargaining session in which Mr. Nimmo agreed to plead guilty to dangerous driving if all the other charges were dropped. The Police agreed to this, provided that Nimmo was given a prison sentence of 45 days. This was recorded in the Provincial Court before his Honour J.D. Takash, on December 14th, 1988, as appears in Exhibit 6. The sentence itself was to be rendered on February 7th, 1989.

The Constable stated that the breathalyzer showed a reading of 1.6 to 1.7 when the normal reading should have been .80.

The next witness to testify was Mr. Gordon Randall, Registrar of Real Estate and Business Brokers.

Mr. Randall stated that Mr. Nimmo failed to properly disclose his previous convictions in breach of the requirements to Question #6 of the application form. It was as a result of the disclosure of the impaired driving charges that Mr. Randall had a search made which revealed the other convictions.

When Nimmo telephoned Randall at a later date, he was told about his failure to make complete disclosure.

Mr. Randall met Nimmo on October 19th, 1988, and asked him to make a list of his convictions. Nimmo asked whether he would be registered once that list was made and Mr. Randall responded that he could not assure him registration. Mr. Nimmo then prepared the list, which was filed as Exhibit 10.

Mr. Randall had asked Mr. Clute to sit in on the meeting, because he found that Mr. Nimmo had selective listening and was quick to get agitated.

Mr. Randall went on to state that Exhibit 10 still did not constitute full disclosure in that Nimmo had not reported his 1984 conviction for assaulting an Edmonton policeman in 1982. Confronted with this, Mr. Nimmo said that some other person had done it having stolen and used his I.D. Later on, Mr. Nimmo apologised and said that the charges made in Edmonton were indeed valid.

Mr. Randall denied registration to Mr. Nimmo because the nature of Nimmo's offences were serious, committed over a prolonged period of time, and he had failed to disclose them in his application.

Mr. Randall stated that Mr. Nimmo told him that an employee of the Registrar's office had instructed him to answer Question #6 of the application by just giving his last conviction. Mr. Randall said that he did not accept this explanation. This Tribunal also finds it highly improbable that any member of the Office of the Registrar would have instructed Mr. Nimmo not to reveal all of his convictions. Question #6 is very clearly worded and requires complete disclosure.

The first witness to testify on behalf of Mr. Nimmo was Carlo Vigna, a registered psychologist. He was asked to make an assessment by Mr. Nimmo and did so on December 5th, 1988, by administering three personality tests. According to the witness, the tests showed that Mr. Nimmo is not sociopathological or delinquent. Mr. Nimmo did exhibit aggressive behavior in the criminal acts he had committed, but Mr. Vigna believed that alcohol contributed significantly to this. Without the alcohol, there would not have been anti-social behaviour.

Mr. Vigna admitted that Mr. Nimmo had not conveyed all the information to him with respect to the various charges against him.

The Tribunal believes that Mr. Nimmo was selective in what he revealed to Mr. Vigna in order to obtain the best possible evaluation.

The next witness was Robert Wit, a friend of Mr. Nimmo and a waiter in the same restaurant as he in 1983. He stated that Mr. Nimmo was honest in his job as a waiter and in handling restaurant money.

Three other witnesses were called to testify on Mr. Nimmo's character: Mr. Adrian Foster acts as his stockbroker and said that he had had no problems with Mr. Nimmo's account. Mr. George Lanes was the Probation Officer to Mr. Nimmo following the conviction on impersonation in 1987. He stated that Mr. Nimmo had complied with all the terms of the probation order and had handled himself in a responsible fashion. Finally, Sherry Nimmo, Mr. Nimmo's sister, said that Mr. Nimmo had helped in the family business from the age of eleven.

The next witness was Mr. John Gibson, a real estate broker. He testified that he has been in the industry for the last twenty-four years and now owns his own office in Etobicoke which employs sixty-eight salespersons in the residential real

estate business. His business is well regarded and has sales of \$120-140 million dollars a year.

He stated that he had known Nimmo since December 1988. He liked Mr. Nimmo when he met him because of his social consideration and had even told him that he would make a good real estate agent because of it. In January 1989, Mr. Nimmo contacted Mr. Gibson stating he wanted to become a real estate salesman. He told Mr. Gibson of all the convictions and pending charges against him. Mr. Gibson stated that he found Mr. Nimmo exceedingly bright, engaging, and personable. He thought Mr. Nimmo would make an excellent salesperson and was prepared to employ him, even subject to conditions. He thought that alcohol explained Mr. Nimmo's brushes with the law.

Mr. Nimmo was the last to testify. He is twenty-six years of age, having been born July 16th, 1962. He received a grade 12 education.

He stated that "he did not feel very good about his record" and "has learned that there is a right side and a wrong side to things", and "that he should be a normal law-abiding citizen."

He began working at an early age and has been a cook, a waiter, a bartender and assistant-manager. The Tribunal notes that the Applicant received very good letters of recommendation from former employers, as well as others who have dealt with him. These recommendations appear as Exhibit 17.

Mr. Nimmo stated that he had handled up to \$50,000 in cash without any complaint from any employer.

At the age of nineteen, Mr. Nimmo had tried to set up his own business which operated for one and a half years, and had received \$125,000 of purchase orders. The business was not successful and incurred debts of \$50,000. The banks were repaid, but the balance owing of \$20,000 eventually forced him to declare bankruptcy.

He testified that he had contacted the former Registrar before registering as a salesman to see if his criminal record would prevent him from being registered. He alleges that she told him to simply put down the most serious crimes since the Registrar's office would then check his whole record. As noted above, the Tribunal does not accept that any official in the Registrar's office would give such a direction.

Mr. Nimmo also testified that he had done certain community work in the Food Bank, 4H and the Toronto General Hospital telethon.

In cross-examination, it was clearly shown that Mr. Nimmo, while revealing the serious charges of impaired driving and mischief had failed to disclose any of his prior convictions in his original application.

He also stated that he had answered Question #6 in thirty seconds. The Tribunal finds that the Applicant did not take the proper time or effort to answer.

When asked about his sentence for his 1987 impaired driving offence, Mr. Nimmo said that his driver's permit had been suspended for two years (until December 1990) and that he had received a jail sentence of 50 days of which two week-ends were spent in jail and the balance was to be carried out through community work terminating May 21st, 1989.

Mr. Nimmo also stated that he was not able to drink alcohol because his kidney had been damaged in the automobile accident.

In response to a question on the charge of impersonating an officer, Mr. Nimmo stated that he had done so in order to find out where an acquaintance was living. He pretended he was a policeman in order to obtain the address from the policeman to whom his acquaintance was reporting.

Counsel for the Registrar has argued that the Registrar is justified in refusing the registration of Nimmo because of his past conduct as evidenced by his past criminal record and because of his non-disclosure of his criminal record.

This Tribunal completely subscribes to the judgments rendered in the following cases on the importance of making full disclosure.

The Tribunal held in the case of Gilford Garage Service Limited and Theodore Ambury (1982) CRAT Summaries of Decisions, Volume 11, p.52 at p.53 as follows:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be

registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

The Tribunal stated in Jack F. Cannan (1983) CRAT Summaries of Decisions, Volume 12, p.57 at p.58 as follows:

Before rendering the reasons for its decision, the Tribunal finds it incumbent upon it to state that it takes a very serious view of non-disclosure of past criminal convictions by an Appellant. Further, the Tribunal wishes to state that it wholeheartedly supports the Registrar's policy to refuse registration and to serve a Notice of proposal, in all instances where there has been non-disclosure.

It is to be noted in the Cannan case, the Tribunal did not allow the Registrar to carry out his Proposal and ordered the registration of Cannan because the nature of the particular criminal offences and the young age of the Applicant did not justify his being refused registration.

In the case of Peter Kodis (1985) CRAT Summaries of Decisions, Volume 14, p.187, the Tribunal stated at p.190:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is

submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

The Tribunal held in the case of Orval David Bradt (1987) CRAT Summaries of Decisions, Volume 15, p.202 at p.204:

The Tribunal has carefully reviewed the evidence. While the answers contained in the 1985 application were not false, they were not the whole truth either. Whether the answers were deliberately phrased to mislead or were worded with little regard to need to disclose full particulars is not clear. In either case, Mr. Bradt was not completely and fully honest in his answers. In this, he showed a lack of integrity.

The Tribunal finds that Mr. Nimmo failed to make complete disclosure as required by Question #6 of the application; however, Mr. Nimmo is not guilty of non-disclosure but rather incomplete disclosure. For failing to make complete disclosure, Mr. Nimmo must be sanctioned. Should that sanction be refusing to register him as a real estate salesman? The Tribunal thinks not. The crimes which Mr. Nimmo committed were, save for the impaired driving offence, relatively minor in nature and committed at a time when Mr. Nimmo was very young. Mr. Nimmo's serious offences were committed after consuming alcohol. Given his kidney injury, it is probable that Mr. Nimmo shall never drink again. As a result of this, his more mature years, and, hopefully, of having learned from his past experiences, one can expect Mr. Nimmo to commit no further driving offences.

Mr. Nimmo has never been found guilty of or charged with theft, fraud, violent crime or misadministration of trust monies. Quite the contrary, his record shows that he has been able to handle money with honesty.

In finding that Mr. Nimmo should be granted registration under certain terms and conditions, the Tribunal was impressed by the following points:

1. Mr. Nimmo has worked from a very young age at difficult jobs in the restaurant industry. In fact, Mr. Nimmo began working when many other children would have been at camp or at play.

As a waiter and bartender, Mr. Nimmo had to deal with the public and it is, therefore, noteworthy that he has received such warm recommendations.

2. Since April of 1987, some two years ago, Mr. Nimmo has had no brushes with the law. This serves to demonstrate that he has put some order in his life and has assumed more responsibility for his behaviour.

3. During the last two years, Mr. Nimmo has also carried out community work and has shown more social responsibility.

4. The crimes for which Mr. Nimmo was convicted were not of a nature to demonstrate that he would cheat the public. This Tribunal has ordered people with more serious criminal records to be registered.

5. Mr. Nimmo has received very strong support from Mr. Gibson with whom this Tribunal was impressed. Mr. Gibson has pledged to supervise and monitor Mr. Nimmo closely. Mr. Gibson's clientele is very well-to-do; his confidence in Mr. Nimmo is, therefore, significant.

The Tribunal, therefore, believes that Mr. Nimmo should be registered as a salesperson subject to certain terms and conditions. As stated before, however, Mr. Nimmo failed to make complete disclosure. As a result, his registration should not take effect until September 1st, 1989.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his Proposal, but to suspend Mr. Nimmo's registration from coming into effect until September 1st, 1989, subject to the following terms and conditions:

1. For the period of registration, Nimmo's registration shall be with Gibson Realty under the supervision and monitoring of Mr. John Gibson and such registration shall continue during the period unless changed with the consent of the broker and acceptance of the Registrar; any

substituted broker during this period shall agree with the Registrar as to the obligations imposed herein.

2. The broker, Gibson Realty, shall supervise all real estate activities of Nimmo, including approving his advertising, listing agreements and sales agreements and contacting all purchasers and vendors for whom Nimmo arranges a completed agreement.
3. The broker shall report each month to the Registrar on the comportment and behaviour of Mr. Nimmo and stating that Mr. Nimmo is fully satisfying the Real Estate and Business Brokers Act. These monthly reports will begin on September 30th, 1989 and conclude on February 28th, 1990.
4. Thereafter, the broker shall submit a report every three months until the expiration of Mr. Nimmo's registration period.

CHARLES L. OHANIAN

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
A. DONALD MANCHESTER, Member

APPEARANCES:

CHARLES L. OHANIAN, appearing on his own behalf

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 20 March 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the Applicant, Charles L. Ohanian, as a real estate salesman because the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty (Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431, Section 6(1)(b); and because the financial position of the Applicant is such that he cannot reasonably be expected to be financially responsible in the conduct of his business (Real Estate and Business Brokers Act, Section 6(1)(a)).

On May 19th, 1987, Ohanian applied for registration as a real estate salesman. He was at that time an undischarged bankrupt, and the Registrar informed him on June 10th, 1987, that registration would not be granted as long as he was an undischarged bankrupt. Nevertheless, he again applied for registration on February 29th, 1988.

A true copy of O'Hanian's Application for Employee Registration as a real estate salesperson was presented to the Tribunal and is Exhibit 5.

Question 7 of the Application is as follows: "Have you ever been convicted under any law of any country, or state or province thereof, of an offence, or are there proceedings

now pending? If yes, give full particulars of all such convictions and proceedings on separate sheet." Ohanian answered, "Yes", and provided a copy of a Probation Order which referred to his having been convicted on February 3rd, 1988 of "...an offence contrary to the Bankruptcy Act between August 18, 1986 and August 25, 1986".

The Probation Order referred to his sentence having been suspended and to his having been placed on probation for six months, and to his having had to make restitution or repayment in the amount of \$700.00.

In March 1988, the Registrar had a criminal record search conducted against Ohanian which recalled the following convictions against him:

Sept. 23, 1985	Corruptly Gave Reward Sec. 383 CC	Fined \$1,000 i/d 30 days
March 2, 1988	Omission in Books/Records Section 169(e) Bankruptcy Act	Suspended sentence and 6 months probation plus restitution of \$700.00

Question 4a of the Application asks, "Are you registered or have you ever been registered, under this or any other Acts? If yes, give full particulars. NOTE: "Any other Acts" pertain to those Acts listed on Page One of this form and any other Acts requiring registration under any provincial statute." In both his initial application of May 1987 and his later one of February 1988, Ohanian answered "No". A search of the records showed that Ohanian was registered as a salesman under the Motor Vehicle Dealers Act in file 2190368 from February 27th, 1984 to August 5th, 1985 on which latter date his registration as a salesman was terminated.

Question 6 of the Application asks, "Are there any unpaid judgments against you? If yes, submit a copy of each judgment. State amount outstanding and repayment arrangements on separate sheet." Ohanian answered "Yes", but did not submit a copy of any judgment and did not disclose the amount outstanding against him, nor did he disclose any repayment arrangements. A search of Writs of Execution in the Judicial District of Peel shows that Guaranty Trust Company of Canada has a judgment against Ohanian in action 257875/86 for \$5,531.53 with costs of \$240.00, as of February 24th, 1986.

Question 5 of the Application asks, "Are you a discharged or undischarged bankrupt or presently a party to bankruptcy proceedings?" Ohanian answered "Yes", and a search of the records of the Registrar in Bankruptcy shows him to be an undischarged bankrupt. Ohanian's Assignment in Bankruptcy occurred on August 25th, 1986, and he was not eligible to be discharged from bankruptcy before February 15th, 1989, since his conviction on February 3rd, 1988 under the Bankruptcy Act extended for a year his date of discharge.

The Registrar has decided that Ohanian should not be registered as a real estate salesman under the Act because:

- a. Ohanian was convicted under the Criminal Code of Canada of having corruptly given a reward contrary to Section 383 and also to having omitted information in his Books/Records contrary to Section 169(e) of the Bankruptcy Act of Canada; and that these two convictions "reflect a singularly consistent line of conduct based on deceit".
- b. Ohanian knowingly did not disclose his Criminal Code conviction in answer to Question 7 on the Application.
- c. Ohanian knowingly did not disclose his prior registration under the Motor Vehicle Dealers Act in answer to Question 4 on the Application.
- d. Ohanian knowingly did not furnish details of the judgment against him by amount outstanding or by repayment arrangement, nor did he provide a copy of the judgment, all in answer to Question 6 on the Application.
- e. Ohanian is an undischarged bankrupt and as a result, his financial position cannot allow him to be financially responsible in the conduct of the real estate business.

Mr. Charles Ohanian gave evidence that he had forgotten about the Motor Vehicle Dealer registration while he was completing Question 4a on the Application. He acknowledged that in his discussion with Mr. Joe Kavanagh on May 4th, 1988,

he stated that his conviction had resulted from the necessity of doing business and showed no remorse about that event. Indeed, he stated to the Tribunal that he would do such an Act again and that "next time I won't get caught".

Mr. Ohanian acknowledged that he was aware of his obligations at the time of his bankruptcy and that his answer to Question 39 at the first meeting of his creditors was not true in that all assets and liabilities were in fact not listed correctly.

Mr. Ohanian expects to be employed by Realty World Mississauga West Ltd., but stated that he had not discussed his employment with the broker/owner of that Company for several months. Mr. Ohanian at present rents a room in a house and has the use of a car which is leased by his brothers' company for which he acts as a commission salesman of carpet sealing tapes while earning from \$300 to \$500 weekly.

Mr. Gordon Randall, the Registrar, Real Estate and Business Brokers, testified that the first day of the Real Estate course is spent in reviewing the Application form and that all candidates are admonished to answer all questions fully and truthfully. He further described his particular ethical concerns about Ohanian in that the types of convictions show a mind set of concealment. Further, as an undisclosed bankrupt with a judgment against him, Ohanian in his business history would be under financial pressures which could lead to errors, omissions and deceptions.

Mr. Glen Bany testified as a character witness for Ohanian whom he had known since 1981 and whose courier service he had used while Mr. Bany provided some business management consulting to the courier service. He said that clients left the service when criminal charges were laid in late 1983. Those charges were all eventually withdrawn except for the one to which Ohanian pleaded guilty, but the business had been ruined. Mr. Bany thought that Ohanian was honest, but on cross-examination admitted that Ohanian's comment that "he would do it again but not get caught" was not an acceptable ethical standard.

The Tribunal must decide whether the Applicant is entitled to registration or has become disentitled by virtue of Section 6 of the Real Estate and Business Brokers Act. The Applicant is entitled to registration unless the Registrar, who has the burden of proof, satisfies the Tribunal that the past conduct of the Applicant is such that it affords reasonable

grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The standard of proof to be met by the Registrar is not as high as in a criminal prosecution.

This Tribunal discussed the standard of proof in the case of Vito Luigi Calogero (1987) CRAT Volume 16, page 206 at page 211:

...The criterion followed by the Tribunal in the past is set out in Re: Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2d), p.470. The decision of Mr. Justice O'Leary reads in part as follows:

"In all cases, before reaching a conclusion of fact, the Tribunal must be reasonably satisfied that the fact occurred, and whether the Tribunal is so satisfied will depend on the totality of the circumstances, including the nature and consequences of the fact or facts to be proved, the seriousness of the allegation made, and the gravity of the consequences that will flow from a particular finding.

The Tribunal is also mindful of the Decision in 1983 of the Divisional Court in Brenner v. Registrar of Motor Vehicle Dealers and Salesmen wherein that Court held that "...unless the Tribunal can find that it [past conduct] does not, [afford reasonable grounds] the Tribunal should not order the Registrar to refrain from carrying out his proposal."

The Tribunal believes that Ohanian has not acted with honesty and integrity in the past and that the cumulative effect of his past conduct affords reasonable ground for belief that he will not carry on business in accordance with law and with integrity and honesty in the future.

Counsel for the Registrar referred the Tribunal to two recent decisions.

In the case of Frederick A. Bullock heard on November 24th, 1988, released on December 12th, 1988, the Tribunal had to decide if a past conduct of 78 serious thefts over a period of 9 years by a former Funeral Director who had served a prison term and made some compensation should preclude his registration as a real estate salesman, especially since he had been refused a registration as a motor vehicle salesman.

The Tribunal in reviewing the principles of trust in such a matter noted:

In reaching its decision in this matter, the Tribunal has placed particular emphasis on the degree of trust which a consumer must place in his salesman when dealing in real estate. The consumer looks to his salesman not only to receive and administer deposits, whether in cash or by cheque, but also depends on the salesman for vital advice. How much should he offer for a home or building? What amount should his deposit be? Is the home he wants within his means?

A salesman is subject to certain important temptations: if he encourages the consumer to offer a higher price, he will receive a larger commission; and yet it is in the consumer's interest that the sales price be as low as possible. In the same way, a consumer wishing to sell should receive the highest possible price. He depends on the salesman not suggesting a lower price just to generate a sale and therefore a commission.

On the basis of the foregoing, it is clear that only people who demonstrate that they can fulfil their fiduciary duties should be permitted to become registered as salespersons under the Act.

In the case of Lloyd Ripani heard on December 8th, 1988 and released on February 14th, 1989, a former police constable who had been convicted of a serious drug offence while a motor vehicle salesman and subsequently lost his registration, applied to be a real estate salesman. In the

decision, a series of cases is referred to which all review the principles upon which registration can be withheld. After reviewing the cases, the Tribunal summarized the principles for registration as follows:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then certain terms and conditions will be imposed. But even with these general principles, there is an overriding principle; namely, that in protecting the public interest, the Registrar must treat each case as an individual matter. This does not mean that the Registrar may act capriciously or inconsistently. Rather it means that while the Registrar must treat each individual equally as is set out in section 15 of the Canadian Charter of Rights and Freedoms, nevertheless, there may be certain circumstances which require the Registrar to refuse registration or to impose terms in order to protect the consuming public.

This Tribunal has in these reasons indicated some of these considerations as they affect the applicant for registration, but there may be others which affect the community and which require the Registrar not only to be fair to the applicant, but also to demonstrate certain standards of moral integrity of registrants to the public at large. Thus matters such as the effects of financial loss to a large segment of the community, a breach of trust, or a callous disregard for people or the laws of this province and country are all matters to be considered by the Registrar.

The Tribunal accepts each of the reasons advanced by the Registrar for the refusal to register Ohanian as a real estate salesman and finds on the evidence adduced that the Registrar is justified under both Section 6(1)(a) and Section 6(1)(b) of the Real Estate and Business Brokers Act in refusing the registration.

Accordingly by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse registration to Mr. Charles L. Ohanian.

RAYMOND H. PURTON

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C. Chairman, Presiding
J. BEVERLEY HOWSON, Member
DONALD MANCHESTER, Member

APPEARANCES:

DAVID J. HUGHES, representing the Applicant

JAMES GIRLING, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 20 June 1989

Toronto

REASONS FOR DECISION AND ORDER

Raymond Herbert Purton of Ottawa was registered as a salesperson under the Real Estate and Business Brokers Act, R.S.O. 1980, Chapter 431 on June 9th, 1983, and has continued since then until his termination on December 7th, 1988, when he left Sampson & McNaughton Ltd. He had applied to be registered as a broker on November 9th, 1988. As a result of three convictions under the Criminal Code of Canada, Section 326 (1)(b) for uttering forged appraisal documents upon which other persons acted, which were registered on September 29th, 1988, the Registrar under the Real Estate and Business Brokers Act proposed on January 6th, 1989 to revoke Purton's registration which was otherwise in effect until June 9th, 1989. On January 16th, 1989, Mr. Purton asked for a hearing before this Tribunal. On February 24th, 1989, Notice of a hearing on this matter was issued returnable in Ottawa on June 20th for the convenience of the parties.

Since Mr. Purton's registration had been terminated in fact on December 7th, 1988, he was really too late to request a hearing and he has withdrawn his application for a Broker's registration.

Since the hearing had been planned in Ottawa, and witnesses had been gathered by Counsel for the Registrar and for Mr. Purton, the jurisdiction of the Tribunal was preserved through

the filing of a new application for registration and the issuance of a new Proposal to refuse registration on June 19th. By consent of the Registrar and of Mr. Purton through their respective counsel, the Tribunal is able to proceed as planned to hear this matter.

In the application of November 11th, 1988 to become a broker, Purton correctly answered Question 6 concerning any convictions, and attached a letter fully disclosing the details of the convictions of September 29th. The Registrar acknowledged that there was no issue of non-disclosure to be considered by the Tribunal.

When Peter Clipsham became the sales manager for the Centre Town Realty Office of Canada Trust, Purton was a salesperson, having joined Canada Trust on January 1st, 1986. They knew each other earlier when Clipsham was with Montreal Trust and Purton was a builder. Purton was described as a quiet man who worked on his own and was a good family man with no apparent current problems. He was a Sales Leader who brought an income to Canada Trust of \$60,000 a year, of which he earned about \$30,000 as a full-time agent. On June 17th, 1988, Sergeant Bruce Keeler of the Ottawa Police Force Fraud Squad visited the office to speak with Purton and search for certain papers. Clipsham was told of the situation and Purton left for his home with Keeler to provide other items. When Purton returned to the office and was very vague in his explanation of the situation, his resignation was asked for effective forthwith. Clipsham later was also concerned about the situation, and when he heard that Mrs. Bate Sampson of Sampson & McNaughton Ltd, an Ottawa realtor had hired Purton, he called her to inform. There was a second event where a property was listed with Canada Trust and the sale completed after Purton left, and a settlement had to be made to share the listing commission between Canada Trust and Sampson & McNaughton Ltd.

Since the 3 appraisals at issue were obtained and used while Purton was an employee of Canada Trust, Clipsham was most concerned about his employer's reputation although no files were opened in the office. Purton was apparently acting on his own without fee and was ignoring the requirements of the strict definition of the word "trade" in section 1(n) of the Act by so doing. Clipsham supervises 28 staff members and would have seen and approved every offer and file document had files been opened in these cases. Clipsham emphasized that Purton as an employee of Canada Trust cannot act on his own even for a friend and without a fee. Because of the results, Clipsham would not consider hiring back Purton even on terms and conditions of supervision.

Mrs. C. Bate Sampson is a broker and President of Sampson & McNaughton Ltd., a prominent and well-established realtor with 20 salespersons in the Ottawa area. She did not recall knowing the details of the charges against Purton when he sought her sponsorship on June 22nd.

She had also signed, as Employer, Purton's application for a broker licence as of November 1st wherein the date of his leaving Canada Trust and joining her company was shown as July 1st, 1988.

Purton had applied to the Real Estate Board of Ottawa-Carleton for associate membership as one of her sales persons. The Directors of the Board first refused the application August 24th and then on September 7th had an interview with Purton. Since charges had been laid against Purton, Mrs. Sampson asked the Board to wait until the charges were disposed of before a final rejection.

In her admirable support of Purton, Mrs. Sampson was concerned with the effect a loss of registration would have on Purton and his young family, and sought a fair deal for him.

After the convictions of September 29th, she appeared before the Board, and the directors at a meeting of November 23rd confirmed their rejection of Purton's application without which membership she could not continue him on as an employee; and if she did would put her own firm membership at risk with a possible loss of access to the Multiple Listing Service of The Board.

Mrs. Sampson terminated Purton as an employee on December 7th by a letter sent from her Sales Manager, Peter R. Bussell; and a Notice was sent in that day to the Registrar.

She said that Purton had really not been thoroughly open with her, and she would not hire him now. During Purton's 5-month stay with her there was the matter of the payment which had to be made to Canada Trust for a share of a listing fee on a property Purton sold on coming with her; and there also were two occasions when Purton listed properties for commissions of 4% and of 2.3% in effect, for which he was disciplined by losing his commission after the employer took the otherwise usual share that a 5% listing would have earned. There were some 5 or 6 other deals which were routinely completed.

Dennis Lajuenesse has been a property manager for Mutual Life and from his earlier duties as an appraiser knew the rules for lending. A correct appraisal plays a critical role in mortgaging procedures since only a maximum of 75% of value can be borrowed without an insured cost for protection if amounts up to 90% of value are loaned against a property.

Lajuenesse referred to an application received for a mortgage on 680 Roosevelt Ave, Ottawa. A mortgage broker Scot-Mor Canada Inc. had made the application on behalf of the purchasers, Tom and Penelope Hickson and Purton was their real estate person.

The appraisal had been done on the apparent forms of Affiliated Appraisers of Ottawa/Hull Limited and was apparently signed by John A. Clark whose Appraisal Institute stamp was affixed. The four-page study had a sketch, an area map for location and photographs attached.

The appraisal showed a value of \$154,000 which was the apparent purchase price, and a mortgage of \$115,000 was sought; which was just at the 75% lending limit. A Mutual Life staff person reviewed the application and questioned the valuation. An amount of \$140,000 was decided upon and the broker when called agreed to a resulting first mortgage of \$105,000, again at the 75% limit. Such a value revision occurs perhaps ten times a year in the total work done at this Mutual Life branch. At the next regular weekly meeting at the branch the topic of appraisers for fees was discussed.

On June 7th a second application for mortgage came to Mutual Life. Purton was going to buy the house at 1300 Snowdon and a valuation was set at \$147,000, again apparently by Affiliated Appraisers. Another Mutual Life staff person became suspicious and in several days Lajuenesse heard of investigations into Affiliated Appraisers. The file on the Roosevelt Avenue property was reviewed and a call to Affiliated Appraisers brought a denial of ever having done the appraisal which had been submitted. Within the hour, the Ottawa Police were on the scene.

An in-house appraisal was done by the Mutual Life office for the 680 Roosevelt Ave property. A corrected value of \$130,000 was decided upon and it was discovered that the photographs in the earlier appraisal were not of the property. There was no paved driveway and both the house area and lot size were smaller than the information submitted earlier.

Since the real value was less, a corrected mortgage value of \$97,500 was set and the Hicksons were approached to repay \$7,500 which they promptly did. Lajuenesse spoke highly of Affiliated Appraisers who were well established and sound in their work. This whole matter only came to light because of Purton's involvement in both files.

For Mutual Life there had been a loan made for more than 75% of correctly appraised value which without insurance for the excess could possibly have put them at a disadvantage. Outside fee

appraisers had only been used by Mutual Life since 1983, and now in the Ottawa area only 2 of the 12 local firms are used. Unfortunately and probably unfairly, the innocent Affiliated Appraisers is not used by Mutual Life.

While the Hicksons were not happy to repay, they did so and thereby would have the 25-year amortized mortgage paid off in 17 years.

The Hicksons had signed the Scot-Mor Mortgage application requesting a mortgage for \$115,000 on a property to be purchased at \$154,000. The mortgage broker had apparently relied on Purton to arrange an appraisal and did not confirm it when received with the said-to-be provider, Affiliated Appraisers. A point which no one could explain to the Tribunal was the purchase price recorded in the deed to the Hicksons which was not \$154,000 but was \$115,000. The Hicksons were not called as witnesses. There was no record of the transaction at Canada Trust.

Gordon Mooers is the owner of Affiliated Appraisers of Ottawa/Hull Limited, and he told the Tribunal that there were in 1988 some 6 firms and a few independent persons doing appraisals of property values in the area. A fee of \$150 was charged to a lender for a verbal response in 24 hours and a written report in 48 hours. An individual owner would pay \$200 for an appraisal of his home property.

Printed forms are used with a rubber stamp for the appraiser's certification number. On another property a call had come in on a valuation and there was no record of the property on file. The valuation form was reviewed and again John Clark denied the signature on the form whose print style was slightly different than their usual stock. Mooers informed the Appraisal Institute and the local Real Estate Board, and suffered an immediate business loss which is slowly being recovered. Mooers claimed \$4,500 in damages from Purton which was paid.

Gordon Randall is the registrar of Real Estate & Business Brokers with 61,000 registrants in his records. He became Registrar in 1988 after 21 years as a realtor, broker and administrator. He confirmed that Purton had been terminated on December 7th, 1988, and that the new application for registration was as an employee of Harry Fletcher, a highly qualified broker who is the manager and part-owner of Viceroy Realty Inc. of Ottawa.

The Registrar proposes to refuse registration to Purton pursuant to section 6 (1)(b) of the Act in that the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The reasons are the three convictions on charges of uttering to which Purton pleaded guilty on the advice of his counsel, wherein forged appraisals were used and persons acted upon them as if they were genuine.

Since complete trust must be able to be placed on any such appraisals by various parties, the forgeries are most serious and the Registrar seeks to protect consumers from such dishonest practices. The Registrar had noted that the public had a high expectation of honourable conduct where registration approves the credentials and character of a real estate salesperson. These recent serious convictions where Purton is still on probation must in his view deny registration. Further, no terms and conditions for registration are seen by him to be workable where there are so many trust relationships which develop in this business. In the Registrar's view, Purton needs to show both remorse and rehabilitation, with some time to pass before reapplying in order to confirm that this was truly an isolated series of events.

Counsel for Purton reviewed the sequence of the charges, the guilty pleas and the convictions which led the Registrar to refuse to register his client as a real estate salesperson. Purton's probation officer is George Sirois who is well qualified and both supervises the conditions of the court as well as acts as a resource broker to help the offender in community connections.

A pre-sentence report was prepared by a colleague based on some interviews together with file information. Purton's lack of prior criminal record and educated status together with a young family and a 20-year business experience in the Ottawa area all led to a very positive report. The report notes that Purton "could not ascertain a justifiable reason as to why the offence took place".

On September 29, 1988, Judge Beaulne considered the favourable pre-sentence report, accepted the guilty pleas to the three offences and suspended sentence with the imposition of a community service order of 120 hours, with 2 years probation on each count. Purton quickly did more than 8 hours each month and completed his tasks at "World Interaction", an Ottawa group encouraging education about international development. Monique Pasquali of that office spoke highly of Purton's hard work and his continuing interest in the project. He has kept the peace and been of good behaviour and the probation officer no longer requires monthly reporting and has in effect closed his file. In his view, Purton's attitudes to society don't really need to be changed and his values and stability are such that any formal rehabilitation is not needed.

Donald Abraham is a very active and successful real estate salesman and had been Clipsham's predecessor as the manager of the Canada Trust branch. He had hired Purton in 1986 and found him to be mature, responsible and an ambitious family man.

Purton's production was acceptable and there were no complaints. Abraham stated that Ottawa is a small community and word travels quickly if there are any problems. He found Purton's actions an inexcusable dumb event when he heard of them, and could not understand why this had happened. Abraham said he was just too busy to hear of much street talk, and knowing now the details of the three uttering offences would be doubtful in hiring Purton now. However, if his attitude was positive, strict supervision could redeem Purton through a very demanding manager.

Harry Fletcher appeared next on Purton's behalf. Fletcher is a well-qualified broker with 2 salespersons, and devotes much of his time to assessment matters, because of his lengthy experience with the Ontario Ministry of Revenue as an assessor. He does much referral work from smaller investment groups and does not actively seek real estate listings. Purton was with his company, Viceroy Realty Inc. from 1983 to 1986 and was a good salesman, with positive attitude, and satisfactory skills and standards.

Purton showed properties thoroughly and developed a knowledge of investment properties, although his paperwork details needed to be supervised. Purton's final project with him was an assembly of land for a shopping centre with counter offers and much detail. Fletcher was shocked when he heard of the use of three forged appraisals and Purton came to discuss the matters. Fletcher was told by Purton that these items had been arranged for by Purton but neither done by him nor that they were seen by him before being used. Fletcher is the sponsor of Purton's new application for registration. The sponsorship was agreed to with the majority shareholder in Viceroy Realty Inc., and a return under certain clear conditions with strict supervision over every activity would be acceptable. Fletcher admitted that he would have preferred to have Purton cleared by the Real Estate Board before being a sponsor for his registration.

The final witness was Ray Purton. Now 43, he trained as a teacher, was a Federal Civil Servant in the early 1970's; spent a year in New Zealand and returned due to his father-in-law's illness. Briefly back into the civil service he began a construction company and owned several properties. In 1982 he took the real estate course and has been a licensed salesman since June 1983.

He has been married since 1973 and has 2 children, now 6 and 2. The family lives in an owned older home in downtown Ottawa and Purton enjoyed the real estate business while becoming moderately successful. He looks forward to returning to work with Fletcher in order to learn more about commercial properties and assessment under close supervision.

His second daughter was born in April 1987 and had health problems whereby she failed to thrive and develop. This was very wearing as the child slept very little and needed constant care. In addition, his mother-in-law was unwell and his wife had left her public service job to be with the children so there were some financial strains.

Purton explained his difficulties by reviewing his relationship with a Paddy Paddington who had attended an open house in 1985, kept Purton's business card and called a year later to introduce a Fred Stephens who was looking for a house in Ottawa. They met at Nate's, a local downtown restaurant, and Purton in conversation mentioned his need for some appraisals within three weeks. Stephens said that he could arrange for a low fee "predictable appraisals" which would obtain the 75% mortgage being sought without any problems, if details of location and comparable area sales figures were provided.

The three events leading to the specific charges were then reviewed by Purton.

In the first case, a property at 677 Edison Ave was owned by a friend and former partner Lynn Schmidt who was a builder and had put up a model R2000 home, and whose mortgagee had decided suddenly not to renew a mortgage. A payout was required forthwith, and Purton arranged with Scot-Mor to approach a lender. An appraisal was sought by Purton through Stephens who sent it directly to Scot-Mor. Nothing more was heard by Purton who took no fee on this matter and did pay the \$50 or \$75 appraisal fee in cash to Stephens. The property was to be purchased by a Mr. and Mrs. Glossop who first had to sell their property at 680 Roosevelt Ave.

In this second case Purton wanted to help his neighbours Mr. & Mrs. Hickson buy a house when they had a lower income than would qualify for a mortgage, and some debts with few other assets. Purton had no listing and there was no fee on this transfer; he just put the parties together, that is he sent the Hicksons in to visit Scot-Mor and got an appraisal through Stephens which led to the Mutual Life involvement as recited in the evidence of Lajuenesse.

Purton paid Stephens \$75 in cash for the appraisal; did not know who or what company was going to do it and didn't ask. When the valuation change saw a lower mortgage being available, Purton said to the Hicksons that he would cover the \$10,000 difference as a 2nd mortgage payable interest only.

In the third case, Purton asked Stephens for an appraisal for 1300 Snowdon, which was owned by an estate whose two beneficiary sons were disagreeing. A person, perhaps the executor, came to Purton to get him to buy the property cheaply even at a

price of \$130,000 which was just above that being offered by a neighbour. The person looked forward to a share in the property's real value of \$139,000 when Purton resold, after deducting a full real estate commission. A third cheap appraisal was sought from Stephens and Purton then went to Coulter Financial, a lender of last resort to arrange a mortgage even with larger fees to be paid for funds from a lender who would not actively question Purton's own income and ability to routinely repay the obligation.

It was then that the Ottawa Police became involved and Purton was shown the appraisal for the Edison property for the first time.

Purton told of his knowledge and then contacted Coulter Financial to suggest that they obtain their own appraisal. In a day or two, Purton called off that deal. Vanguard Trust of Toronto were going to place the mortgage on the Snowden property and Purton asked to have his application documents returned.

Purton called Stephens and met to confront him about these serious problems. Stephens handed over a package in a yellow bag and said he was leaving for Europe. Since other real estate transactions were going on, Purton was most upset by all this. On a visit to the police station, Purton co-operated in discussions and was then finger-printed and charged. At trial, guilty pleas were entered to the uttering charges although Purton said he had no intent to forge and had not seen the appraisals which had been sent in. While Purton had some wilful blindness, he said that the pleas were not understood in that he did not realize how important the word "knowing" meant in all of this.

Purton accepted his responsibility in all of this; Stephens had fled; a lengthy trial was avoided; Mooers received a settlement.

There was no evidence of any forgery by Purton. Purton accepted an obligation to both Mr. and Mrs. Hickson and to Schmidt; none of whom were called as witnesses at this hearing.

Purton could not explain why anyone would go to the trouble of printing forms and making stamps similar to those of Mooer's company and then sell several cheap appraisals after all that effort. Purton did not look into the package which Stephens gave him but took it home and put it unopened in a tool box in a basement storage room from where he removed it and gave it to the police when they visited him.

The matter of the shared listing commission difficulty with Canada Trust and Sampson & McNaughton Ltd. was explained as some confusion resulting from an expired listing which was later re-listed and sold; and a statutory declaration from the Vendor supported his explanation.

Purton provided the Tribunal with two other statutory declarations from a teacher at his daughter's school and from a client whose properties Purton has managed. These declarations were in support of Purton's registration as a salesperson but since Purton did not tell either of his criminal charges and their results, the Tribunal cannot rely greatly upon them.

Counsel to the Registrar reviewed the reasons why Purton should not be registered as:

- a) the fact of the guilty pleas resulting in three convictions for uttering; and the breaches of trust which occurred.
- b) the failure to fully and clearly inform Clipsham Sampson or Fletcher of the events which occurred.
- c) the wilful blindness in using Fred Stephens who apparently without any qualifications himself provided very cheap documents which were then used.
- d) the dealings with the contact for the Snowdon property and the understanding to share in the benefit for the resale of an undervalued property as well as to take commission thereon.
- e) the message such an immediate registration of a person still on parole would give to the public, to other realtors, and appraisers, and to other business persons in the small interconnected Ottawa community.

On behalf of Purton, his counsel admitted the events but asked for a look at his client's whole life with the pressures of obeying parole as a positive factor in Purton's rehabilitation. Purton was seen to be wilfully blind without any personal criminal intent. It was suggested that Purton was less critical than he should have been because he was not acting for any fee. While Purton could be self-employed in other areas, he wants to be in the real estate industry very much and has persevered in his application and undergone this hearing to publicly prove himself. Any terms and conditions placed on a renewed licence would be acceptable.

The Tribunal has to decide on this application through a consideration of the following principles:

1. As was stated in the case of Downey (1988) CRAT Volume 16, p.216 at p.218:

The Tribunal's first and foremost concern in considering a possible registration under the Act must be and is the protection of the public interest.

2. The Tribunal recognizes that the Registrar has the responsibility to determine whether an Applicant is acceptable for registration as a real estate salesperson. In reaching his decision, the Registrar must follow the provisions of Section 6 of the Real Estate and Business Brokers Act which states that an applicant is entitled to registration by the Registrar except where, "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty".
3. This Tribunal may intervene to reverse the Registrar's refusal to register an applicant - but it may only do so where the Registrar has made an error in reaching his decision. In the absence of such error, the Tribunal will direct the Registrar to carry out his Proposal not to register an applicant.

This principle was clearly enunciated in the case of Richard G. Brenner heard by the Supreme Court of Ontario (Divisional Court) on March 9th, 1983. The Court held at page 4 of its judgement:

"The effect of section 7(4) is that the tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under section 5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional discharge."

Here the Tribunal must ask if the Registrar erred in concluding that the past conduct of the Applicant afforded reasonable grounds to believe that he would not carry on business in accordance with law and with integrity and honesty.

In reviewing the facts as presented to us, the Tribunal cannot conclude that the Registrar's decision is wrong.

Accordingly by virtue of the authority vested in it under section 9(4) of the Real Estate & Business Brokers Act, the Tribunal directs the Registrar to carry out his proposal.

LLOYD RIPANI

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
GEORGE J. CORMACK, Member

APPEARANCES:

ALBERT FACCENDA, agent for Lloyd Ripani

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 8 December 1988

Toronto

REASONS FOR DECISION AND ORDER

This is an application by Lloyd Ripani to set aside the Proposal of the Registrar of Real Estate and Business Brokers to refuse the registration of Lloyd Ripani as a real estate agent. The Registrar's Proposal is based on the provisions of clause 6(1)(b) of the Act in that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The chronological facts upon which the Registrar relies for this opinion are fairly clear and straightforward. The Applicant was employed commencing at age nineteen as a policeman with the Hamilton-Wentworth Regional Police Department for seven years from March 1977 until June 1984 when he resigned from the force. On July 6th, 1984, he was convicted of Personation and use of a gasoline credit card between November 1983 and May 1984. Evidence was given that the amount involved was approximately \$350.00 and that Mr. Ripani was emotionally disturbed by the death of his brother in that period which caused him at age twenty-five to be committing such a crime. In any event, the sentencing judge suspended sentence and placed Ripani on 24 months probation. Evidence was further given that restitution of the amounts involved was made.

Lloyd Ripani was granted registration under the Real Estate and Business Brokers Act June 12th, 1984. Mr. Ripani acknowledged before the Tribunal that he had answered Question #7 of the application, with respect to convictions or proceedings pending, in the negative based on an enquiry of the Human Rights Commission. Exhibit 4, being the Director's Certificate, indicates that Mr. Ripani was registered until June 12th, 1986. It would appear that the registration was not cancelled, but it would also appear that there was no attempt to renew such application, possibly because of the facts disclosed hereafter.

It would also appear that after a short period of employment as a real estate agent, Mr. Ripani was registered under the Motor Vehicle Dealers Act and became employed as an automobile salesman in November 1984.

On October 22nd, 1986, Mr. Ripani pleaded guilty to a charge of conspiracy to traffic in a narcotic, cocaine, and was sentenced on November 27th, 1986 to a term of 12 months and probation of 18 months. This charge arose out of incidents occurring between February and June 1985. As a result of this conviction, Mr. Ripani's registration renewal of December 3rd, 1986, under the Motor Vehicle Dealers Act was cancelled October 26th, 1987, after a hearing in July 1987 by the Commercial Registration Tribunal [16 CRAT (1987) p.121].

The Tribunal was impressed with Mr. Ripani and his background and conduct, notwithstanding the two convictions noted. The Tribunal noted as well that Mr. Ripani had served only seven weeks of incarceration, being released on parole on January 14th, 1987, but also noting that such parole would not expire until November 27th, 1987. That Tribunal commented as well upon the fact that Mr. Ripani left blank the response to Question #7 in his December 1986 application for registration apparently on the advice of the Human Rights Commission.

It found no fault on the part of Mr. Ripani in failing to disclose, but also found that if disclosure had been made, the Registrar under the Motor Vehicle Dealers Act would have refused registration. That Tribunal went on to say at pages 123-124:

...But is this then in itself sufficient for the Tribunal to sustain the Proposal of the Registrar to revoke...Let us look at other factors. Evidence adduced...of Mr. Ripani's recent conduct is most

favourable to him and was uncontradicted ...The greater concern, however, is the fact that Mr. Ripani is on parole which will not expire until November 27th of this year. The Registrar has stated quite clearly his opposition to any applicant being registered while on parole considering it inconsistent with the Act. The Tribunal is...in agreement that it is inappropriate for Mr. Ripani to be registered under the Act while on parole." [Emphasis added]

While Mr. Ripani's parole ended November 27th, 1987, he was still on probation for eighteen months. But in fact, this probation was terminated on June 21st, 1988. Shortly thereafter, the Registrar under the Motor Vehicle Dealers Act granted Mr. Ripani registration under that Act on certain conditions.

In March 1988, Lloyd Ripani applied for registration under the Real Estate and Business Brokers Act. All questions were answered and full disclosure was made in the attached material. It is this application which is the subject matter of the Registrar's Proposal and which is before this Tribunal.

The evidence of continuing good conduct presented to this Tribunal is consistent with the evidence of good conduct which was commented upon by the Tribunal dealing with the Motor Vehicle Dealers Act application in July 1987. In addition, Mr. Ripani's parole has been completed for more than a year and even his probation has been terminated.

In his Proposal the Registrar stated on page 3 that:

1. Ripani, as a police officer...was put in a position of trust.
2. His criminal convictions cover serious criminal activity in violation of any trust position.

In fact, only the activity which resulted in the first conviction was committed while Mr. Ripani was a member of the Hamilton-Wentworth Regional Police Force and that sentence was suspended. While this Tribunal does not think lightly of such conduct, it appears in that case that there may have been extenuating circumstances and it is only one element of the

past conduct of the Applicant to be taken into consideration four years later. The same is true of the conspiracy conviction in respect to events more than three years ago.

The recent conduct of the Applicant is also to be given some weight, particularly in view of the concepts of reformation and rehabilitation espoused by our society and the general public to whom the Registrar is responsible. Present society, particularly since the enactment of the Canadian Charter of Rights and Freedoms in 1982, now propounds the principle that when a sentence has been served, if there is sufficient evidence of true reformation, then the individual should be entitled to return to a responsible position in the community. The Tribunal cautions that it is not suggesting there should automatically be registration of applicants after a specified time, rather these principles should be applied to the circumstances of each application: the nature of the offence, the sentence imposed, acceptance of responsibility for the offence by the applicant, conduct of the applicant, evidence of moral reform.

In the present case the Tribunal, in observing Lloyd Ripani and hearing the evidence of those in close contact with him, is satisfied that there has been a positive change at this time. This is not to say that the Registrar should not also have some further assurance that, if this Applicant is to be registered, additional supervision and perhaps a surety bond should for a time be given. In his re-examination, Mr. Randall, the Registrar, indicated that if a surety of \$50,000 had been offered (as was offered at the hearing before this Tribunal) such would have been taken into account, together with additional terms if such could be made workable in the business of the Applicant's proposed broker.

The Tribunal also notes that the Applicant has been registered under the Motor Vehicle Dealers Act with terms, and while it respects Mr. Randall's views as to the differences between many licensees under each Act, it appears to this Tribunal that the nature of Mr. Ripani's business as an automobile salesman is not too dissimilar from his business as a real estate salesman and that the interest of the public can be protected by the imposition of terms on Mr. Ripani in the issuance of this licence.

Arguments were made at this hearing as to apparent inconsistencies of policy of the Registrar in granting licences. In the view of this Tribunal, these inconsistencies are more apparent than real because, as has been stated herein, each application is unique and must be considered on its individual merits.

This Tribunal has, however, examined the cases cited to it and would like briefly to comment upon them in comparison to the application before it presently.

The Tribunal has already discussed at length, and commented upon the Lloyd Ripani Motor Vehicle Dealers Act case heard in July 1987, noting the significant difference in respect to parole status in that case and this.

The Tribunal has considered very carefully the case of Albert Faccenda and the Registrar under the Real Estate and Business Brokers Act, heard September 17th, 1987 [16 CRAT (1987) p. 220]. Mr. Faccenda, who was convicted of the same conspiracy to traffic charge in October 1986 along with Mr. Ripani, actually answered Question #7 of his application in the negative. Mr. Ripani has answered the question affirmatively. Mr. Faccenda was a policeman at the time of the trafficking charge; Mr. Ripani was not. At the time of the Faccenda hearing before the Tribunal, he was still on parole and would have a further eighteen months probation to serve. This is not the case with Mr. Ripani, whose parole and probation have been terminated prior to the application being brought before this Tribunal.

Concern was expressed before this Tribunal in regard to the principles laid down by the Divisional Court in 1983 in the Richard G. Brenner case. In that case, the Court noted that the Tribunal appeared to have had a sympathetic concern for Brenner, that he might in the future be a person of honesty and integrity and that he should be given a second chance. The Court disagreed with this approach by the Tribunal, but did state at page 5 of its decision:

Almost a year has now elapsed since the Board gave its decision....It may be that the Tribunal if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year...

This Tribunal has had the benefit of observing Mr. Ripani in the witness box, of hearing evidence of associates and of his prospective employer, of examining letters of reference, including that of his former parole officer, of noting the comments concerning reformation as expressed by the Tribunal in July of 1987 and of the fact of his current registration under the Motor Vehicle Dealers Act which is also consumer protection legislation. With the benefit of this cumulative evidence which was not all available to the Registrar, this Tribunal, applying the principles laid down by the Divisional Court in the Brenner case, is able to come to the conclusion that the past conduct of Mr. Ripani up to the date of this hearing does not afford reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Reference was made to the Kenneth Chartrand case heard by the Tribunal July 13th, 1988. The facts of that case are vastly different from those in the present case. Chartrand was continuing under parole until 1993 and exhibited no sense of remorse. Chartrand exhibited a moral blind spot in respect to trafficking in narcotics, considering it to be just a business. Mr. Ripani on the other hand indicated that he had caused embarrassment to his family and felt that he had learned his lesson. Evidence was presented to the Tribunal that he could be trusted with money. He also acknowledged that he knew that the two convictions registered against him were for wrong acts and that he was trying to overcome these in the Hamilton community where he was known and where knowledge of the convictions was common.

In the two Sunderland cases referred to this Tribunal Brian F. Sunderland [14 CRAT (1985) p.98] and Brian F. Sunderland [16 CRAT (1987) p.125], there are several distinguishing features: namely, that parole had not been completed and that the evidence of good conduct was therefore not of sufficient strength to show reform. These cases may perhaps more readily be compared to the Faccenda case to which reference has previously been made. But in the case of Mr. Ripani, parole is completed and evidence presented to this Tribunal is of a current nature.

In a number of cases referred to this Tribunal, registration has been permitted on certain conditions or has been refused because of special circumstances as the following examples indicate.

In the Daniel Tessier case [16 CRAT (1987) p.261], Tessier had been convicted of trafficking and in fact appeared

still to be somewhat immature when appearing before the Tribunal. But the Tribunal was satisfied that Tessier was intent on reform and directed that he be registered when his probation period was completed in October 1988.

In the Ruby Richman case [15 CRAT (1986) p.212], the Applicant had served his sentence and exhibited a reformation in his conduct, but was authorized to be registered only if he made restitution of the more than \$400,000 which as a lawyer he had taken from his clients.

In the Ronald W. Northover case [13 CRAT (1984) p.292], registration was refused because the Applicant had failed to make restitution. It is conceivable that the Tribunal could have gone the way of other Tribunals and granted registration conditional upon restitution. It should be noted, however, that under the provisions of Section 10 of the Act, if Northover were to make restitution he would be entitled to make a new application showing material changes in circumstances, so that the decision of the Tribunal in 1984 is not substantially different from the decisions where registration has been granted on terms and conditions.

In the Steve Herman case [11 CRAT (1982) p.184] and the James Leslie Downey case heard May 5th, 1988, as well as in the many Consent Orders filed in argument with this Tribunal, registration has been granted, but terms and conditions have been imposed.

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then certain terms and conditions will be imposed. But even with these general principles, there is an overriding principle; namely, that in protecting the public interest, the Registrar must treat each case as an individual matter. This does not mean that the Registrar may act capriciously or inconsistently. Rather it means that while the Registrar must treat each individual equally as is set out in section 15 of the Canadian Charter of Rights and Freedoms, nevertheless, there may be certain circumstances which require the Registrar to refuse registration or to impose terms in order to protect the consuming public.

This Tribunal has in these reasons indicated some of these considerations as they affect the applicant for

registration, but there may be others which affect the community and which require the Registrar not only to be fair to the applicant, but also to demonstrate certain standards of moral integrity of registrants to the public at large. Thus matters such as the effects of financial loss to a large segment of the community, a breach of trust, or a callous disregard for people or the laws of this province and country are all matters to be considered by the Registrar.

In the present case, this Tribunal is of the view that no such overwhelming public issues are applicable and that as a result, Mr. Ripani has by his recent past conduct revealed that there are not now reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. This Tribunal is, however, of the opinion both on the evidence presented and the terms offered by the Applicant and the views expressed by the Registrar, that Mr. Ripani's registration should be subject to certain conditions.

Therefore, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to refrain from carrying out his proposal, and register the Applicant subject to the following terms and conditions:

For a term of one year:

- 1) Lloyd Ripani shall post surety in the amount of \$50,000 with the Registrar, such surety to be available for compensation in respect to any loss occasioned from breach of the Act or the Regulations thereunder by actions of Ripani.

For a period of 2 years:

- 2) Ripani's registration shall be with Com-Can Mercantile Realty Corporation (Christopher Di Liberto) (the "Broker") and such registration shall continue during the period unless changed with the consent of the Broker, not to be unreasonably withheld; any substituted broker during such period to agree with the Registrar as to the obligations imposed herein.
- 3) The Broker shall supervise all real estate activities of Ripani, including approving his advertising, listing agreements and sales agreements and contacting all purchasers and vendors for whom Ripani arranges a completed agreement.

- 4) The Broker shall report quarterly to the Registrar with respect to the agreements referred to in (3), including providing copies of such agreements and written summaries of his investigations during the quarter.
- 5) The Broker shall acknowledge to the Registrar his acceptance of these conditions and agree to follow specific directions of the Registrar in regard to his supervision of Ripani's real estate activities.

NEERA SENGAR

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
MAURICE LAMOND, Member

APPEARANCES:

DEREK R.J. GREENSIDE, representing the Applicant

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 18 April 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse registration to the Applicant, Neera Sengar, as a real estate salesperson because her past conduct affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty.

The facts are as follows:

On April 12th, 1988, Sengar applied to become registered as a real estate salesperson. The application was filed as Exhibit 7.

In response to question 7 of the application as to whether the Applicant had ever been convicted of an offence, the Applicant responded "Yes". Instead of enumerating or detailing her convictions, the Applicant attached to her application a letter from her parole officer dated April 11th, 1988, disclosing that she had been convicted on June 29th, 1987, on a charge of false pretences contrary to Section 338(1)(b), C.C.C. for which she received a conditional discharge and was put on probation for two years.

The letter from the Parole Officer constituted the entire disclosure made by the Applicant with respect to past convictions.

The Registrar investigated the past convictions of the Applicant and discovered that, with respect to the June 29th, 1987 conviction she had not received a conditional discharge, but had been fined \$300.00 and placed on two years probation.

The Registrar also discovered that the Applicant had been convicted on March 4th, 1981, for theft under \$200.00 for which she received a conditional discharge and a two year probation order.

The Registrar subsequently decided that the Applicant should not be registered as a salesperson under the Act because:

1. She failed to disclose all her criminal convictions in her application and gave incorrect information with respect to the criminal conviction of 1987, the whole constituting the furnishing of false information.
2. The past conduct of the Applicant which included criminal activity involving theft and fraud afforded reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with integrity and honesty.
3. The Applicant has not demonstrated that she has been rehabilitated.

Mr. Joe Kavanagh, registration officer at the Registration Office, was the first witness to testify. He, together with Ms. Talbot, handled the Applicant's application. When he discovered the failure to list one offence, as well as to properly describe the offence of 1987 and the sentence imposed by the Court, he summoned the Applicant for a meeting.

At the meeting, the Applicant was asked about the 1981 conviction. She stated that it had involved her taking a wallet from a store and that the charge was a result of a mix-up.

She offered the same sort of explanation for the 1987 conviction; she did not admit or assume responsibility for the conviction.

Mr. Kavanagh felt that Mrs. Sengar was not being honest in her explanations of how the thefts occurred.

The next to testify was Mr. Randall, the Registrar of the Real Estate and Business Brokers. He stated he was most disturbed by the following:

1. The failure by the Applicant to make full disclosure.
2. The failure of the parole officer to correctly describe the full facts of the 1987 conviction, as well as to correctly describe the sentence.
3. The failure of the Applicant to correct the errors in the parole officer's letter or to add the information required.
4. The type of crimes committed by the Applicant which go to the very heart of the notion of trust and integrity which is so important in a regulated industry.
5. Real Estate salesmen are often entrusted with the keys to a home and have free access to a potential seller's house. The criminal record of the Applicant involved dealing dishonestly with another person's property.
6. The lack of openness and credibility by the Applicant when discussing her previous convictions. She would admit no wrongdoing. Under the circumstances, therefore, she had not demonstrated that she had been rehabilitated.

Finally, Mr. Randall declared that the real estate courses which Applicant attended clearly warned each student of the importance of filling in the application form properly and truthfully.

In defence, the attorney for the Applicant produced a letter written by the probation officer. That letter was in response to one sent by the Applicant's attorney asking why the 1981 offence had not been included in the original letter of the parole officer.

The probation officer, Mrs. M.L. Kidy, responded in her letter of February 14th, 1989:

.....

With regard to the letter dated April 11th, 1988, which was given to Mrs. Sengar by the writer; the Probation Office often provides probationers with a general letter regarding their current probation status to give to prospective employers (or whomever they choose.) These letters, as was the case with Mrs. Sengar's letter, often detail the specifics of the offense, the court appearance, their response to probation, their attitude and the Probation Officer's opinion regarding the prognosis for rehabilitation.

As Probation Officers, we do not do a C.P.I.C. or R.C.M.P. check on each new probationer. We would however have knowledge of the previous record if there was a Pre-Sentence Report on file. There was not a Pre-Sentence Report prepared on Mrs. Sengar. We provide the court with the criminal record on an offence in a Pre-Sentence Report and do not provide copies of the record to the probationer, or anyone else.

.....

The Tribunal notes that the letter of Mrs. Kidy attached to the application form seemed to serve two purposes: first, it set out the current probation status of Mrs. Sengar and second, it served as a letter of recommendation to a prospective employer.

As Mrs. Kidy has stated in her letter, the April 11th letter attached to the application form was not meant to set out the entire criminal record of the Applicant.

Mrs. Sengar then gave her testimony to the Tribunal. She stated that she had received an M.A. in Economics at a University in India. She came to Canada in 1975.

She went on to say that she had recently been a volunteer in a school library for a period of a year, spending ten to twelve hours a week at this task.

When asked by her counsel why she had not revealed her 1981 conviction, she answered that her lawyer, in 1981, had told her that she did not have to mention it on any application form because she did not have a conviction. The lawyer was not a witness at the hearing.

When asked about her answer to question 7, Mrs. Sengar stated that she had asked the probation officer to set out her record. She had checked the probation officer's letter and accepted and relied on it as a complete answer to question 7. She said that she did not intend to mislead the Registrar in answering question 7 and that it was the probation officer's fault for not including the proper information.

In cross-examination, Mrs. Sengar stated that she had never told Mrs. Kidy, the probation officer, about her 1981 conviction and that she had never been asked by her about past convictions.

She admitted noticing that the probation officer's letter contained no information with respect to the 1981 conviction, but did not feel she had to report it.

Mrs. Sengar also stated that she had told her prospective employer about her 1981 conviction, even though she did not inform the Registrar in the application form about the said conviction.

The Tribunal found that Mrs. Sengar was evasive in answering certain questions and was not a credible witness. She had a tendency to blame others for her criminal convictions and failure to make full disclosure. Her convictions were the result of a mix-up; failure to fully disclose was the fault of the probation officer. The failure of Mrs. Sengar to mention the 1981 conviction was also the fault of her attorney in 1981. It is to be noted that neither the attorney, nor the parole officer, was summoned as witnesses.

The Tribunal finds it improbable that Mrs. Sengar's attorney, a criminal lawyer, would have given the legal opinion that a conditional discharge rendered non-existent the 1981 conviction.

In reaching its judgment, the Tribunal is governed by the following principles:

1. As was stated in the case of Downey (1988) CRAT Volume 16, p.216 at p.218:

The Tribunal's first and foremost concern in considering a possible registration under the Act must be and is the protection of the public interest.

2. The Tribunal recognizes that the Registrar has the responsibility to determine whether an Applicant is acceptable for registration as a real estate salesperson. In reaching his decision, the Registrar must follow the provisions of Section 6 of the Real Estate and Business Brokers Act which states that an applicant is entitled to registration by the Registrar except where, "the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty"

3. This Tribunal may intervene to reverse the Registrar's refusal to register an applicant - but it may only do so where the Registrar has made an error in reaching his decision. In the absence of such error, the Tribunal will direct the Registrar to carry out his Proposal not to register an applicant.

This principle was clearly enunciated in the case of Richard G. Brenner heard by the Supreme Court of Ontario (Divisional Court) on March 9th, 1983. The Court held at page 4 of its judgment:

The effect of section 7(4) is that the tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a

second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under section 5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

In the present case of Sengar, did the Registrar err in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that she would not carry on business in accordance with law and with integrity and honesty? The Tribunal thinks not. The Tribunal finds that the Registrar based himself on a series of important considerations and facts which, when taken together, justify the Registrar's decision to deny registration.

The Tribunal has made the following findings with respect to the reasons given by the Registrar for refusing registration:

1. The registrant failed to make full disclosure in her application. The Tribunal finds that it was Mrs. Sengar, and not the parole officer, who had the obligation and responsibility to clearly set out previous criminal convictions. Who knew them better than Mrs. Sengar? By her own admission, she was well aware that the parole officer had not accurately described the nature of the conviction in 1987, as well as the sentence. She also knew that the 1981 conviction had not been disclosed. It was Mrs. Sengar's duty, therefore, to provide any information which had been left out.

There have been numerous judgments by this Tribunal emphasizing the importance by an applicant of making full disclosure. These cases have also held that failure to make full disclosure constitutes reasonable grounds for refusing registration because it demonstrates a lack of integrity and honesty.

In the case of Orval David Bradt (1987) CRAT Volume 16, p.202, the Applicant disclosed that he was convicted of conspiracy to traffick in cannabis marijuana and sentenced to three years in jail, but he failed to disclose that his driving

licence was suspended twice. The Tribunal held at page 204 of the judgment:

The Tribunal has carefully reviewed the evidence. While the answers contained in the 1985 application were not false, they were not the whole truth either. Whether the answers were deliberately phrased to mislead or were worded with little regard to need to disclose full particulars is not clear. In either case, Mr. Bradt was not completely and fully honest in his answers. In this, he showed a lack of integrity.

The facts of the Sengar case are very similar to those of Bradt.

In the case of Gilford Garage Service Limited and Theodore Ambury (1982) CRAT Volume 11, page 52, Ambury also only answered partially the question of whether there were any convictions against him. He disclosed one conviction without listing others. At page 53 of its judgment, the Tribunal underlines the importance of the application form and of its being properly answered:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment.

The Tribunal then went on to state in deciding that the Applicants should not be granted registration:

The Legislature has set out that registration under the Act is related to a business which is to be carried on in accordance with law and with integrity and honesty. The Tribunal finds that the completion by the applicants of the applications is such as to give reasonable grounds for belief that in respect of these applicants there would be the contrary.

A similar judgment was rendered in the case of Peter Kodis (1985) CRAT Volume 14, page 187, where the Tribunal again stated the importance of the application and its reflection on the integrity of the applicant. It held at page 190 of its judgment:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and time again, this Tribunal has pointed out the seriousness of non-disclosure of matters, particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions and the selection of convictions which were made known.

[See also the case of Neil M. Kennedy in which judgment was rendered February 16th, 1989.]

2. The nature of Sengar's past convictions justify refusal of registration. As the Registrar has pointed out to the Tribunal, a consumer relies greatly on a real estate salesman in a number of areas. He relies on his salesman for proper advice as to the price he should buy or sell a home. He acts on the belief that the advice received is in his best interest, and not in the interest only of the broker who wants to earn a commission.

In addition, a prospective seller must give complete and free access to his home to the real estate agent; therefore, he must be certain that the property in his home will be safe. The purpose of the registration process is to be able to assure consumers that the salesman with whom they are dealing is not only competent, but also trustworthy.

Finally, on occasion, the salesman may receive funds on behalf of his client. The client, therefore, depends on the honesty and integrity of the salesman in accounting for those funds.

The nature of the Mrs. Sengar's criminal convictions justifies the concern of the Registrar that consumers may be at risk when dealing with her.

In the 1987 conviction, the Applicant changed price tags on some eight items. This demonstrates a clear intention to criminally deceive to pay less for the shopowner's products. The Applicant's 1981 conviction involved taking property which did not belong to her.

It is true that the amounts at issue were small; however, personal property contained in a consumer's home can be of very high value. Given the Applicant's past conduct, could she be expected to resist the temptation when alone in a client's home? The Registrar is certainly justified in his concern in this regard and in his conclusion that it is the protection of the public which is paramount when considering possible registration under the Act.

In the case of Jakobs (1987) CRAT Volume 16, page 223, this Tribunal heard a case with relatively similar facts. The Jakobs' case, however, only involved one breach of trust. Jakobs was convicted on a charge of theft of property exceeding a value of \$200.00. This occurred when he substituted zircons for diamonds which had been brought by a client for cleaning and polishing. The Tribunal held that a criminal record of itself was not necessarily a bar to future registration. It stated at page 226:

A criminal record, of itself, is not necessarily a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to

be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the case of Kodis, the crimes were possession of a stolen credit card, as well as possession of stolen property.

The Tribunal held at page 190:

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen, they may have fairly free entry into homes, often they have the keys, and property is exposed.

The Tribunal held that Kodis should not be registered as a real estate salesman.

Counsel for the Applicant has cited the case of Downey as a basis upon which the Registrar should be found in error in reaching his conclusion not to register the Applicant. This Tribunal does not agree. In the Downey case, most of the offences were drug related and the Tribunal accepted Mr. Downey's evidence that he no longer used drugs. The Tribunal also went on to hold:

The Tribunal's first and foremost concern in considering a possible registration under the Act must be and is the protection of the public interest. The question to be considered in this instance is whether Mr. Downey's registration as a real estate salesman would create a real

risk to the members of the public with whom he would be dealing in that capacity. The Tribunal after carefully considering all of the evidence and observing the demeanor of the Applicant on the witness stand is of the view that it is unlikely that Mr. Downey will present a risk to the public. In arriving at this conclusion, the Tribunal has taken into consideration the nature of the convictions in question. The majority were drug related, including the break and enter and extortion offences which are of serious concern to the Tribunal. The Tribunal accepts Mr. Downey's evidence that he no longer uses drugs and has not used drugs since October 1983. It is therefore improbable that there will be a recurrence of unlawful activities by the Applicant. It is also to be noted that, with the exception of the initial conviction of theft under in 1977 relating to a shoplifting incident that occurred when Mr. Downey was only 16 years of age, there is no record of any theft, fraud or similar offences.

This is to be contrasted with the nature of the Applicant's offences and her age at the time of committing them. At the time of the last offence, the Applicant would have been more than thirty-three years old.

In addition, the Tribunal found that Mr. Downey had demonstrated that he was capable of keeping himself gainfully employed in an honest manner. For more than two years with his current employer, he was found to have had a good work record in his dealings with the public and had worked in people's homes without any incident or complaint by such people. In other words, the Applicant had proved that he could be trusted.

The Applicant in the present case has yet to establish that she is worthy of such trust.

Counsel for the Applicant also cited the judgment of Keogh (1988) CRAT Volume 17, page 234. While the crimes committed by Mr. Keogh were more serious than those in the present case, the Tribunal found in favor of Keogh because of five character witnesses who had testified, each of whom the Tribunal found most impressive. Through these witnesses, the

Tribunal was convinced that Mr. Keogh had been completely rehabilitated.

In the present case, no witnesses came to testify on behalf of the Applicant and the Applicant herself gave no proof of rehabilitation.

3. The Applicant has not established her rehabilitation. The Tribunal is of the opinion that the Applicant has not demonstrated her rehabilitation. Her failure to admit her wrongdoing makes the process of rehabilitation impossible. One cannot begin to rehabilitate oneself until one acknowledges one's wrongdoing. In the present case, the Applicant attributed her two convictions to a mix-up; her failure to disclose completely on her application was attributed to false or wrong information received by a lawyer in 1981 - an explanation which this Tribunal finds improbable; and incorrect information as to her past record is blamed on a letter of the Applicant's parole officer when the contents of the letter would indicate that the Applicant had not asked her parole officer to give her full criminal record.

It is incumbent upon the Applicant to prove her rehabilitation. Such proof of rehabilitation involves acknowledging the crimes committed, as well as a sufficient period of time elapsing to establish that she will now conduct herself with honesty and integrity.

In the case of Kenneth Chartrand (1988) CRAT Volume 17, page 199, the Tribunal stated on page 200:

This Tribunal approves the decision of the Tribunal both in the first and second Sunderland cases, that a period of rehabilitation is necessary to establish that an individual no longer lacks honesty and integrity and will conduct his business in accordance with the law.

It is also the view of this Tribunal that the period of sentence, including any parole period within that time should reasonably be considered as the minimum rehabilitation period. This is not to say that in certain circumstances and with respect to certain crimes a lesser period may be appropriate to assess effective rehabilitation, but certainly in the case of crimes involving financial or fiduciary matters, great care should be taken by the Tribunal in permitting registration of a salesman in such a profession as that

governed by the Real Estate and Business Brokers Act. This was clearly the view of the Tribunal in the Gary Brian Williamson case 16 CRAT (1987) p. 266, which stated at page 271:

...while there is evidence before the Tribunal which suggests that the Applicant has apparently achieved some degree of rehabilitation and reformation, the very nature and seriousness of the crimes of which he was convicted are such that the Tribunal cannot make a finding that the Registrar has erred in refusing to grant the registration.

In the Ripani case rendered February 14th, 1989, in considering the principle of rehabilitation, the Tribunal held that one of the elements was the acceptance of responsibility for the offence by the Applicant. In the present case, the Applicant has refused to do so.

The elapsing of sufficient time from the last conviction to demonstrate that the Applicant has truly "turned over a new leaf" was also required in the cases of Israel Jakobs mentioned above, and Stuart A. Montgomery (1988) CRAT Volume 17, page 257. In the case of Montgomery, it was held on page 258:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

In the case of Jakobs, the Tribunal held at page 226:

An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered

under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

Given the nature of the Applicant's convictions, her failure to answer correctly and honestly in her application for registration and her failure to demonstrate her rehabilitation, the Tribunal believes that the Applicant has not proved that the Registrar erred in refusing to register her.

For this reason, the Tribunal is of the opinion that the past conduct of the Applicant affords reasonable grounds for belief that she will not carry on business in accordance with law and with integrity and honesty.

Accordingly, by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

MILOSLAV ZLAMAL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JAMES R. BREITHAUPT, Q.C., Chairman, Presiding
HELEN J. MORNINGSTAR, Member
WILLIAM J. BINGLEY, Member

APPEARANCES:

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

No one appearing for the Applicant

DATE OF

HEARING: 9 May 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from the Proposal of the Registrar, Real Estate and Business Brokers, to refuse to renew the registration of the Applicant, Miloslav Zlamal, as a real estate salesman in the Province of Ontario. The Proposal, which has been put before the Tribunal, has set out at length a variety of complaints as to the conduct and activities of Mr. Zlamal that the Tribunal believes have been proven here this morning.

The basic Proposal is based upon two aspects of Section 6 of the respective legislation: having regard to the financial position of the Applicant, the Registrar believes that the Applicant cannot reasonably be expected to be financially responsible in the conduct of his business and; secondly, with respect to the past conduct of the Applicant, the Registrar believes that this affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

We have had before us the particular complaint upon which the renewal was refused, that of Mr. and Mrs. Daicar, and the information as to the judgments and executions that have resulted from the various activities of Mr. Zlamal, which now totals more than some \$700,000.

The Registrar's reasons also go to the failure of disclosing the judgments, to the matter of Highway Traffic convictions, and to the matter of financial responsibility and past conduct as I have referred to.

From the evidence given by Mr. Gregory Nevin, the investigator with the Business Practices Division, we accept the fact that Exhibit 12, the statement prepared by Mr. Zlamal, was acknowledged by him to be a correct statement of his assets. However, from the review of that information which is set out in the comparative figures of Exhibit 21, Mr. Nevin has concluded that, in fact, there was a deficit of at least \$146,000 in the liabilities of Mr. Zlamal and not a proposal of some assets of a net worth of \$814,000.

We accept the fact by Exhibit 20, that Mr. Zlamal received a further payment of \$10,000 from Mr. Myslivec using this statement which was clearly false. From the comments which Mr. Nevin has made, we acknowledge that Mr. Zlamal was always looking for new sources of funds, and apparently he would attempt, or said he would attempt to invest these funds if persons would loan him money on various promissory notes, and this was all done while he was registered as a real estate salesperson in the Province of Ontario.

The evidence which Mr. Myslivec has given has been that of the betrayal of an old friend and acquaintance; someone on whose reputation in the community had led him to advance monies and someone that he counted on with respect to the statement that had been prepared as a valid and accurate one upon which to advance further monies on the promissory note.

We also have the evidence of Ms. Pavlinek, the sister of Mr. Myslivec who has also known Mr. Zlamal for some thirty-five years. Again, the mortgage that was prepared for her on the Florida property was based upon a lack of search of title because she relied upon Mr. Zlamal to properly ensure that her second mortgage was properly secured and was subject on that property only to a \$10,000 prior mortgage and not, as she found in fact, to a prior mortgage of some \$65,000.

It was particularly unfortunate to hear of the advance of further monies from Mrs. Pavlinek's niece which Mrs. Pavlinek, in turn, became responsible for and which funds were lost through the activities of Mr. Zlamal.

We accept the evidence of Mr. Otto Daicar concerning the advances which total now some \$60,000 in obligations that Mr. Zlamal has been evading.

All in all, the various points that have been raised by the witnesses are believed by the Tribunal. I would add it is unfortunate that the persons, these witnesses, and no doubt many others who advanced money to Mr. Zlamal without any security, without checking the facts, without, I suppose, wanting to embarrass a fellow member of the community by asking the questions that should have been asked, that they really have had some part to play in this ongoing problem. However, belief and trust are things which are important in this life. If some of these problems had been brought forward earlier, perhaps, the applications of 1983 or 1985 would both have shown up matters that could have saved some persons a lot of grief.

In the summary of evidence which was provided by counsel for the Registrar, we accept the comment that Mr. Zlamal, as a real estate salesman, used his trust to obtain loans with false statements of values and assets. While some thought that he could invest better in properties than they might do so themselves, he clearly was involved in an ongoing scheme which has cost members, particularly of the Czech community in Toronto, much money and much grief.

Various particulars that are alleged by the Registrar as to the reasons why registration should not be renewed, total some eleven in number and this Tribunal accepts them as they are set out here. We accept, particularly, the third item concerning the complaint from the Daicar family and the fourth item with respect to the variety of executions and the attempt by Mr. Nevin to work out what in fact were the exact amounts owing and the deficit which, in fact, exists. We note that executions, at least one of which was extant at the time of the application of July 14th, 1983, were not admitted and details were not provided.

In addition, in the application of May 24th, 1985, questions were not properly answered. A number of judgments did exist and were not referred to, and that also is an offence in accordance with the legislation. Indeed, on the application as set out in Item 10 of July 10th, 1987, there was an admission of other judgments, but Mr. Zlamal failed to submit a copy of each judgment and to state the amount outstanding and the various repayment arrangements.

We accept the eleventh item particularly, that with respect to the answers given to question 7 concerning convictions under the law of any country or state or province. In this instance, there were convictions with respect to the Highway Traffic Act that have been revealed since and are

accepted in accordance with the exhibits filed as being items to which Mr. Zlamal should have responded.

Mr. Zlamal has had the opportunity to be present this morning or to provide us with a doctor's certificate as to why his health could not allow him to be here. He has not chosen to avail himself of the opportunity and we have, accordingly, after waiting this morning for fifteen minutes decided to proceed in his absence.

The members of the Tribunal believe that the allegations made on behalf of the Registrar of Real Estate and Business Brokers have been proven and accordingly, we are unanimously agreed, that in order to have improved public protection, the Registrar is directed by virtue of the authority vested in it under Section 9(4) of the Real Estate and Business Brokers Act to proceed with the Proposal to refuse to renew the registration.

HARI-WORLD TRAVELS INC.

APPEAL FROM A DECISION OF THE BOARD
OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
J. BEVERLEY HOWSON, Member
KEITH COPPARD, Member

APPEARANCES;

G.A. COHLY, agent

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF

HEARING: 11 July 1989

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Hari-World Travels Inc. from the Decisions of the Board of Trustees' Compensation Fund, Travel Industry Act, denying two claims against the Fund. The claims are unrelated and, therefore, will be dealt with separately by this Tribunal.

The first claim arises out of the failure of Javed Travel Agency to pay fully the amount due to Hari-World Travels Inc. as wholesaler for tickets issued by the latter in the sum of \$21,572.76. This is the value of the tickets issued by Hari of which a balance of \$9,903.18 remains outstanding. The facts are set out in a letter from Mr. G.A. Cohly, President of Hari-Travels to the Registrar of the Travel Industry Act:

November 02, 1988

The Registrar
Ministry of Consumer and Commercial Relations
The Travel Industry Act
555 Yonge Street
Toronto, Ont. M4Y 1Y7

Dear Sir,

M/s Javed Travel Bureau Inc., 1240 Bay
Street, Toronto, Ont. M5R 2A7, telephone

office (416) 960-8348/960-8475 and Res 275-9149, purchased PIA tickets for the value of \$21,572.76 and made cheque payments to us totalling \$18,411.91. All their cheques were bounced and returned to us. In the meanwhile they closed their account and opned (sic) a fresh account. When contracted they gave two cheques for \$2000.00 ea.dt. Aug. 12 & Sept.01,88 and they too were bounced. Our office tried to certify one of the cheque dated August 12,88 but in vain. They replaced both the cheques for dated Aug. 18 and Aug. 23,88 and were cashed. They replaced one more cheque for \$2883.72 and gave us after certifying it. They gave one passenger's cheque for \$2063.00 dated Sept.09,88 by endorsing it in our favour and was also cashed. They returned one ticket for refund, purchased on credit card for the value of \$2445.74. The total of bounced cheques etc. was \$18,411.92 and the total of amounts thus received was \$8,508.74, leaving the pending balance of \$9,903.18, which is still pending.

Mr M.Javed Paul, the owner/President of M/s Javed Travel Bureau informed us that he was arranging mortgage against his house and shall pay the pending balance of \$9,903.18, latest by October 12, 1988. With this assurance the undersigned left for trip to India, Singapore and to attend ASTA convention at Budapest. On October 31,88, we contacted Mr Javed Paul at his residence and asked for our money again. As usual, he continued giving false promises. M/s Javed Travel received payments from the customers and gave us bounced cheques. We are of the opinion(sic) they are diverting business funds else where (sic) and deliberately cheating and depriving us by holding our payments for no reasons whatsoever.

We are enclosing photo copies of the tickets, bounced cheques, other documents along with the correspondence, with a

request to kindly help us with the overdue payments of our pending amount of \$9,903.18 without delay.

Thanking you for your assistance.

Yours Very Truly
for Hari-World Travels Inc.,

(G.A. Cohly)
President

From the evidence, it appears that all the passengers for whom the tickets were issued received their travel accommodation both going to and returning from their destinations. They were, therefore, never at risk and never had any claim against the Compensation Fund upon which they could succeed. There was, however, no evidence introduced to indicate how much they had paid to Javed which was not passed on to Hari Travel.

The Board of Trustees in disallowing the claim said in a letter of February 27th, 1989 to Mr. Cohly

...It was the decision of the Board at that time that the above claim was not valid as it does not meet the criteria outlined in the Schedule under the Act - terms of Compensation Fund, Section 15.

The Board of Trustees denied this claim on the basis of an extension of credit to the named travel agency. You have previously had called to your attention by the Claims Officer two decisions made in 1988 in similar cases and call your attention to the comments made by the Commercial Registration Appeal Tribunal concerning qualifications for travel agency compensation.

All passengers covered by the claim departed in July and August 1988, received the travel services they contracted and paid for and, therefore, were never at risk. There was never a possibility of a claim against the Compensation Fund by the consumers and none has been so received.

No action appears to have been taken by Hari-World Travel to contact the consumers or to advise them that their trip may have been at risk.

On the issue of credit, it is plain from the admission of Mr. Cohly in his letter to the Board that he accepted cheques to replace others that were N.S.F. and made some arrangement with Mr. Javed Paul to wait for payment until Paul could arrange a mortgage on his home. This extension of time to pay can only be interpreted, of course, as an extension of credit.

The case law on all matters of this nature support the premise that the fund is not an insurer and that business risks were not intended to be insured by the fund.

The fund should not and cannot operate as a kind of business insurance to protect firms against ordinary business losses - the fund was designated for the protection of the consuming public. Credit extended must be at the risk of the travel wholesaler and not at the risk of the fund.

.....

The fund can operate to protect the travel wholesaling firm in a case where it has sustained a loss as a result of some act undertaken deliberately to protect a consumer or consumers who would otherwise have sustained a loss.

Der Travel Service Limited (1981) 10 C.R.A.T. 149
Tour East Holidays (Canada) Inc. (1986) 15 C.R.A.T. 239

It is clear from the evidence and the line of cases from which we quote only the above two, that the Applicant's case must fail. There was, in our view, an extension of credit as the result of a trade debt and there is no evidence that the agency's clients, the travellers, were ever at risk. Their trips had been successfully completed without interruption or interference. For these reasons, this claim is disallowed.

The second claim results from the use of an American Express credit card by one Mit Patel who had been employed by Big Ben Travel Agency. Patel purchased two tickets to Nairobi for his wife and son using the credit card of one Abdul Majeed Ali which

was later found to be fraudulent. Why Patel would have purchased the tickets through Hari-Travel instead of Big Ben, with whom he was employed, was never explained.

In any event, the Patels left for Nairobi and although they had return tickets, it appears they chose not to come back. Neither their passage to Nairobi nor their return were ever at risk.

The airline carrier KLM, however, on learning of the fraud debited the Hari Travel account in the sum of \$2,175.00 for their loss which Hari then paid. Hari Travel now comes to this Tribunal to be compensated from the fund since its claim has been disallowed by the Board of Trustees on the following grounds:

From the supporting documentation which you provided to us, we have determined that KLM advised you of the credit card charge back in December of 1988. All passengers departed in August of 1987, received the travel services that they contracted and paid for, and therefore were never at risk. There was never a possibility of a claim against the Compensation Fund by the clients.

In the case of Penhale Travel Agency (1988) 17 C.R.A.T. 281, the Commercial Registration Appeal Tribunal considered a similar problem in that it involved fraud pointing out that all the conditions of Section 15(2) of Regulation 938 of the the Travel Industry Act must be satisfied.

Section 15(2) sets out the conditions which a Travel Agent must satisfy to receive compensation from the fund. The Tribunal believes every one of the conditions listed must be satisfied. These conditions are as follows:

1. The travel agent must deal at arms' length with the travel wholesaler.
2. The travel agent must pass his clients money to a travel wholesaler.
3. The travel agent must have arranged alternate travel services for the

client as a result of the travel wholesaler's failure to provide such travel services.

The above section deals with the travel agent and similarly, Section 15(3) deals with the wholesaler and specifies particularly that, "the travel wholesaler has at his own expense reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler..."

These conditions have not been met and at no time was the claimant subrogated to the position of the clients since they received without interruption or any uncertainty the travel accommodation for which they had contracted.

This claim is not unlike the first one we have dealt with except for the additional evidence of fraud. There is, however, ample case law which supports the only finding we can make and that is to disallow the claim.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal hereby confirms the Decision of the Board of Trustees and disallows both claims of Hari-World Travels Inc.

HARI-WORLD TRAVELS INC.

APPEAL FROM A DECISION OF THE BOARD
OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding
GORDON R. DRYDEN, Member
KEITH COPPARD, Member

APPEARANCES;

G.A. Cohly, its agent

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF

HEARING: 15 November 1989

Toronto

REASONS FOR DECISION AND ORDER

The Applicant, Hari-World Travels Inc., ("Hari") a registered travel wholesaler and travel agent, appeals from the decision of the Board of Trustees under the Travel Industry Act, wherein the Board denied the Applicant's claim for the sum of \$3,351.50 from the Compensation Fund.

As indicated in Section (1) of the Schedule to Regulation 938 under the Travel Industry Act, R.R.O. 1980, the Compensation Fund was established "to stand in the place and stead of a participant for the payment out of the fund of such claims of clients of the participant that the participant has refused after demand or is unable to pay...".

The Applicant submits that his claim falls within, and should therefore be paid out, pursuant to Section 15 (3) of the said Schedule. Section 15 (3) provides as follows:

(3) Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has

provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

The facts are relatively simple and are not in dispute. Hari is an "I.A.T.A." agent and holds airline ticket stock authorized under the Bank Settlement Plan. On April 3, 1989, Hari was contacted by 4 Seasons International Travel Inc. ("4 Seasons") who was at the time (but is no longer) a registered travel agent. At that time Hari accepted a booking from 4 Seasons for two K.L.M. return airline tickets to Accra, departing June 11, 1989, and returning June 24, 1989. This was only the second time that Hari had done business with 4 Seasons, the first occasion had been in March, 1989, and had been uneventful.

Subsequently, on May 10, 1989, 4 Seasons delivered to Hari, and Hari accepted, an uncertified cheque, drawn on the bank account of 4 Seasons, in the sum of \$3,348.00. In exchange, Hari delivered the two K.L.M. airline tickets to 4 Seasons, together with Hari's invoice to 4 Seasons, dated May 10, 1989, in the sum of \$3,348.00.

On May 15, 1987, the aforesaid cheque was returned, marked "NSF" for not sufficient funds. At this juncture, Mr. Cohly, the President of Hari, contacted Ms. Jean Jackson of 4 Seasons who promised to return the airline tickets to Hari by May 19, 1989. However, the tickets were not returned, and, a few days later, Hari learned that 4 Seasons was out of business and that Ms. Jackson could not be located.

On May 24, 1989, Hari paid the sum of \$3,352.22 to KLM Airlines for the two tickets. Mr. Cohly also contacted KLM by letter on the same date requesting, in essence, that KLM prevent the passengers from travelling. Mr. Cohly also contacted and wrote to the passengers, threatening to "cancel the reservations" if they did not produce documentary evidence of payment for the tickets.

At the same time Mr. Cohly was in touch with the Registrar's office and sought that office's assistance and advice in respect of dealing with the situation that had arisen. The Registrar advised Mr. Cohly not to attempt any further contact with the passengers.

It was the evidence of Mr. Jean Paul Struyve, the Regional Passenger Sales and Service Manager for KLM Airlines, that the passengers in question became concerned when they received the correspondence from Hari and contacted Mr. Struyve at KLM to seek reassurance that they would be permitted to travel on the issued airline tickets. They produced to Mr. Struyve two receipts for amounts totalling \$3,454.00 which receipts were apparently issued by 4 Seasons and which were, on their face, receipts for payment in respect of the two KLM airline tickets. Understandably, having been presented with prime face evidence that the tickets had been paid for, and having no evidence to the contrary, Mr. Struyve assured the passengers that they would be permitted to travel. Subsequently, KLM records indicated that one passenger travelled on the scheduled flight and for, unknown reasons, one did not. No refund has been claimed in respect of the unused ticket.

Under cross-examination Mr. Cohly stated that he is aware that there is some risk involved in accepting uncertified cheques. Mr. Cohly noted that the cheque in question was accepted on May 10, 1989, and the departure date was not until June 11, 1989. He believed that with this length of time prior to the departure date he had the option of having the airline stop the passengers in the event that the cheque did not clear. Mr. Cohly also testified that he thought he also had the ultimate protection of the Compensation Fund since he is a participant in and contributes to that Fund.

As has been stated many times by this Tribunal in previous decisions, the purpose of the Compensation Fund is to protect consumers who have paid for, but have not received, travel services. Section 15(3), of the Schedule must be read in conjunction with Section 15(1), and not in isolation. To succeed under Section 15(3) there must have been a potential claim by the client/consumer which has been averted by the intervention of the travel wholesaler who has acted deliberately in order to protect the consumer. In such circumstances, the travel wholesaler can step into the shoes of the consumer/client to claim reimbursement from the Compensation Fund. In effect, the travel wholesaler is permitted to claim against the Compensation Fund where, but for the travel wholesaler's intervention, the consumer/client would

have had a right to make a claim against the Compensation Fund. This is clearly not the situation here. These passengers were never at risk and did receive the travel services that they were entitled to (the fact that one passenger failed to travel is not relevant as KLM was clearly prepared to allow that passenger to travel). The passengers never had a potential claim against the Compensation Fund. Hari did not intervene to protect the consumer. To the contrary Hari tried, but failed, to prevent the travel services from being delivered.

This Tribunal has stated many times that the Compensation Fund is not intended to be business insurance for travel agents and wholesalers. This is clearly what Mr. Cohly thought the Compensation Fund was. He was aware that there is a risk involved whenever an uncertified cheque is accepted in exchange for airline tickets. He accepted the cheque knowing that there was a risk that the cheque would not be cleared and did so in the mistaken belief that he could have the airline stop the passenger from travelling. He also clearly relied on the further mistaken belief that he could look to the Compensation Fund for reimbursement. By accepting an uncertified cheque in exchange for the airline tickets, Hari was in effect extending credit to 4 Seasons since the airline tickets were delivered before payment was received, payment occurring only once the cheque had been cleared. This may be a perfectly reasonable and customary way of doing business in the travel industry, but it is one which necessarily involves a degree of risk. The risk, however, is one which the recipient of the cheque must bear, not the Compensation Fund.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Schedule to Revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim.

OUTDOOR ADVENTURES LTD.

APPEAL FROM A PROPOSAL
OF THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT
TO REVOKE THE REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
KEITH COPPARD, Member

COUNSEL: JANE WEARY, representing the
Registrar under the Travel Industry Act

No one appearing for the Applicant

DATE OF 18 November,

HEARING: 19 December 1988

Toronto

REASONS FOR DECISION AND ORDER

In view of the evidence which has been presented, the Tribunal feels it is unnecessary to render written reasons in this particular matter. The Tribunal notes that no claim has been made with respect to any business dealings which Mr. Nyuli or the Applicant, Outdoors Adventures Limited has caused. There has been apparently no claim in that respect and on the other hand, there is a clear indication that the business is not of much size and, in fact, it is in a deficit position. Therefore, the Tribunal cannot disagree with the decision of the Registrar as to the financial operations of this registrant.

The legislation, the Travel Industry Act, is consumer protection and it would be remiss of this Tribunal to simply say that because no claim has been made, that the Registrar is not without some foundation in making the proposal that he does with respect to the financial operation. On the other hand, it has been clearly demonstrated to the Tribunal that the registrant Outdoors Adventures Limited, and through its officers, in particular Mr. Nyuli, has failed to comply with the requirements under the Travel Industry Act and for whatever reason, it appears to the Tribunal, that by failing to make such compliance if anyone were seeking travel services from Outdoor Adventures Limited in Ontario, they might have a great deal of difficulty actually locating this company which is presently registered as a travel agent.

We are also particularly aware of this letter which Mr. Nyuli on behalf of Outdoor Adventures Limited has filed with the Tribunal and which has been recorded as Exhibit 4 in these proceedings. While the letter itself is somewhat ambiguous, it does appear to the Tribunal that Outdoor Adventures Limited clearly indicates that it is not prepared to act as a registered travel agent in the Province of Ontario.

Accordingly, by virtue of the authority vested in it under Section 6(4) of the Travel Industry Act, the Tribunal directs the Registrar to carry out his Proposal.

619513 ONTARIO INC. c.o.b. as
TIN-BO TRAVEL SERVICES

APPEAL FROM A DECISION OF THE
BOARD OF TRUSTEES UNDER THE TRAVEL INDUSTRY ACT
DETERMINING CLAIM OF THE CLAIMANT

TO BE NOT ELIGIBLE FOR PAYMENT

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
TIBOR PHILIP GREGOR, Member
PETER BONCH, Member

APPEARANCES:

GERALD O'DEA, representing the Applicant

MICHAEL D. LIPTON, Q.C., representing the
Board of Trustees

DATE OF

HEARING: 5, 6 July 1989

Ottawa

MAJORITY DECISION

The following is the decision of the Chairman and Mr. Tibor Gregor, Member:

On December 20th, 1988, the Board of Trustees of the Travel Industry Compensation Fund refused the claim for compensation made against the Fund in the amount of \$108,004.85 by 619513 Ontario Inc., carrying on business as Tin-Bo Travel Services (hereinafter referred to as "Tin-Bo Ottawa"). The decision therein was issued on January 11th, 1989. On January 26th, 1989, Tin-Bo Ottawa requested a hearing before the Commercial Registration Appeal Tribunal to review this refusal; and the hearing took place in Ottawa, Ontario on July 5th and 6th, 1989.

The refusal by the Trustees was based on the review by them of Section 15 in the Schedule "Terms of Compensation Fund" which forms part of Regulation 938, as amended, made under the Travel Industry Act, R.S.O. 1980, chapter 509 as amended. The review brought a denial of the claim on the basis that Tin-Bo Ottawa had extended credit and this was not intended as a protected item in section 15, as aforesaid.

The Summary of the Applicant's reasons for appeal set out four grounds as follows:

1. The Board erred in its interpretation of the legislation and/or the regulations and/or in its application of the said legislation and/or regulations to the facts.
2. The Board erred in basing its decision on irrelevant considerations and in its failure to consider relevant facts.
3. There was no evidence before the Board to find that 619513 Ontario Inc. granted credit to Timbo (sic) Travel Services Limited. And further the Board erred in finding that the granting of credit was a relevant consideration.
4. Such further and other grounds as counsel may advise.

At the commencement of the hearing, counsel submitted a Statement of Agreed Facts, which set out the following items:

1. 619513 Ontario Inc. at all material times was duly registered under the Travel Industry Act as a travel wholesaler.
2. 619513 Ontario Inc. at all material times was a subscriber and participant in good standing to the compensation fund as a travel wholesaler and is eligible to file a claim for compensation as a wholesaler.
3. Tin Bo Travel Services Ltd., at all material times was duly registered under the Travel Industry Act as a travel retailer and was a participant in good standing to the compensation fund as a travel retailer.

4. At all material times 619513 Ontario Inc. acted in good faith and at arm's length with Tin Bo Travel Services Ltd.
5. 619513 Ontario Inc. in the normal course of business duly purchased and paid for rights to travel services from Air Canada and China Air for the purposes of resale to a travel agent, which rights are represented by airline tickets, the particulars of which are listed on page one, two and three of schedule "A" to the original claim for compensation of 619513 Ontario Inc. filed herein, and hereinafter referred to as "the tickets".
6. 619513 Ontario Inc. delivered the tickets to Tin Bo Travel Services Ltd.
7. Tin Bo Travel Services Ltd. did not collect the full payment for each of the tickets prior to departure from the clients listed on pages one, two and three of the said Schedule "A".
8. Tin Bo Travel Services Ltd. failed to pass any of the clients' money to 619513 Ontario Inc.
9. All of the said clients received the travel services they contracted for.
10. Tin Bo Travel Services Ltd. was petitioned into bankruptcy and 619513 Ontario Inc. cannot collect from Tin Bo Travel Services Ltd., the payment for the said travel services provided.
11. The value of the travel services provided by 619513 Ontario Inc. is
(a) \$24,489.40 for March 1988 tickets; (b) \$83,515.45 for the

April 4th, 1988 China Tours, for a total of \$108,004.85.

12. 619613 Ontario Inc. has properly filed a Notice of Claim for compensation under the Travel Industry Act and has properly complied with the procedural requirements for a hearing before the Commercial Registration Appeal Tribunal.

In the list above, Item 7 is amended as agreed at the hearing, and the parties reported that there was not complete agreement on Item 4.

Tin-Bo Travel Services Ltd. as referred to in the statement will in this decision be referred to hereafter as "Tin-Bo Toronto". Counsel for the Board of Trustees filed for the benefit of the Tribunal a book of nineteen documents in chronological order and an authorities brief.

The claim of Tin-Bo Ottawa was made pursuant to Section 15(3) of the Terms of the Compensation Fund schedule which is as follows:

(3) Where a participant who is a travel wholesaler has acted in good faith and at arm's length with a participant who is a travel agent and the travel agent has failed to pass his client's money to the travel wholesaler and the travel wholesaler has, at his own expense, reimbursed the client or has provided the travel service contracted for but not paid for by the travel agent to the travel wholesaler, the travel wholesaler shall be entitled to claim for the refund of that portion of the client's moneys received by the travel agent that the travel agent failed to pass to the travel wholesaler, but in no event shall the travel wholesaler be entitled to claim any portion of such moneys that represent commissions.

As outlined by counsel for the Trustees, the claim by Tin-Bo Ottawa is that, acting in good faith and at arm's length, services were provided to the clients of Tin-Bo Toronto when Tin-Bo Toronto failed to pay for tickets provided and, accordingly, a refund should be obtained for the value of those tickets less any commissions.

Tickets were provided and the clients did make the trips which they planned during March and April 1988. The net amounts after commissions were deducted were agreed to be \$24,489.40 in March and \$83,515.45 in April; for a total claim of \$108,004.85.

The two reasons given by the Trustees to reject the claim were:

- a) that by delivering the tickets without receipt of payment Tin-Bo Ottawa was extending credit to Tin-Bo Toronto, and such an extension is not covered so that such a risk of non-payment by an "NSF" cheque or otherwise is entirely the business risk of the wholesaler, Tin-Bo Ottawa;
- b) that the clients who travelled were never at risk and all went on their respective trips and returned, so that Tin-Bo Ottawa does not have any claim since services must be provided after a client has a loss when the ticket is not paid for in order to have protection from the Fund.

Counsel for the Applicant stated that credit had not been extended and that the clients were at risk since the various trips went forward only because the tickets were delivered. And further, that the first group of tickets in March were given with the immediate expectation that a cheque would be issued when the invoice was received. The second group of tickets was hand-delivered by Mr. Anton Cheng, the owner of Tin-Bo Ottawa on Good Friday, April 1st, 1988, and a cheque was received for payment which was uncertified, and which was deposited on Sunday evening, April 3rd in a bank night depository prior to the flight to China on Easter Monday, April 4th when Mr. Cheng went along on the trip as leader. This deposit was alleged by counsel to have been made

in the normal course of business and was not the extension of any credit. Further, that on being told by telephone of the apparent bankruptcy of Tin-Bo Toronto and of the failure of the cheque to clear, Mr. Cheng carried on with the trip to the benefit of the clients, and the completion of the service to them should be compensated since they were otherwise at risk.

Mr. Anton Cheng is the President of the Applicant, 619513 Ontario Inc. which carries on business as Tin-Bo Travel Services. His partner in this Ottawa business is Ms. Willie Lee; and they purchased this business from Henry Wong who had operated it as a branch of his Tin-Bo Travel Service Limited (Tin-Bo Toronto), while Mr. Cheng was the local manager for ten years. Mr. Cheng and Ms. Lee paid \$50,000 for the business and by an agreement of October 17th, 1985, were allowed by Mr. Wong to continue the use of the Tin-Bo name and Chinese character design. Tin-Bo Ottawa is otherwise an independent company with no other relation by ownership, personally or by obligation to Tin-Bo Toronto.

In 1985, Tin-Bo Toronto provided tickets to Tin-Bo Ottawa for tours of China, but problems between Tin-Bo Toronto and the China Travel Service saw Tin-Bo Ottawa become the wholesaler for that area of Canada. Tin-Bo Toronto bought several thousands of dollars worth of tickets from Tin-Bo Ottawa during 1986 and 1987, usually paying for them on delivery by courier with a cheque sent back forthwith in a usual business relationship.

Up to March 1988 all business had been cleared, but the twenty-three tickets valued at \$24,489.40 were not paid for during March 1988, although many promises almost daily were made by telephone by Mr. Wong. The eighty-two air tickets valued at \$83,515.45 were provided in April only on the promise of an immediate cheque which was given as aforesaid. Cheng went on the trip as a leader using a free ticket. Tin-Bo Toronto, in fact, forwarded the "land" portion of the client's fares to the China Travel Service by bank draft for \$30,638.00 which Mr. Cheng took with him and paid directly.

Cheng did not worry about the cheque being uncertified since previous payments had all gone through normally. He said he would have cancelled the trip if he was not paid and that Wong had gone to his office to get a cheque for him. The other March amount was sought, but not paid, on the excuse by Wong that the balance was not completely known. Even while in China, Cheng said he could have cancelled the trip because of his relation with the China Travel Service although since the land portion was fully

paid in advance and booked, he could not clearly tell the Tribunal why the Chinese authorities would bother to do that and what the consequences to his agency would be if he did so. If the passengers were marooned in China, the Fund might have been called upon to repatriate them.

On April 10th or 11th, he heard that the large cheque was "NSF" and by borrowing funds for the business, Ms. Lee was able to cover the obligation to China Travel Service. This special flight to China had been filled by the eighty-two Toronto passengers with the balance from the Toronto area.

The bankruptcy of Tin-Bo Toronto saw debts to the Royal Bank of Canada of just over \$1,000,000; plus a further \$1,700,000 in U.S. funds; and Tin-Bo Ottawa filed a claim in the bankruptcy of \$110,918.00.

Ms. Willie Lee is an active partner in Tin-Bo Ottawa. She confirmed that there was no problem with Tin-Bo Toronto prior to the events of early 1988 as set out heretofore. She stated that Mr. Cheng delivered the tickets on April 1st, 1988, in order to get a cheque to pay for all eighty-two of them. A telex was sent by her to Mr. Cheng in China on April 6th to report that Tin-Bo Toronto had closed their business. On April 7th, Mr. Cheng called her and showed concern over whether the deposited cheque would clear, but cancellation was not decided upon. Mr. Cheng called each day and she took the various steps of having the cheque returned as "NSF", and filing proof of claim in the bankruptcy of Tin-Bo Toronto. The trip was not cancelled to protect the future of Tin-Bo Ottawa and the relations with China Travel Service, as well as to not discomfit the passengers who were not told of the event and apparently were not at any risk of losing their trip.

In her response to the question as to why a certified cheque was not demanded before the tickets were turned over, she said that she and Mr. Cheng believed the cheque would be honored. This belief was held even though this amount was far larger than any previous transaction with Tin-Bo Toronto, and warnings had been given over several weeks by telephone that payment would be required and that cancellation could occur if payment was not made.

Ms. Lee stated that there were funds in the bank account of Tin-Bo Ottawa to cover the \$24,000.00 debt and that she borrowed funds to pay into the account so that their cheque to Air China for \$83,515.45 was honoured.

Mr. Michael Janigan, a partner in the law firm representing Tin-Bo Ottawa, appeared as a witness to review a situation in 1982 wherein the Applicant had been paid by the Trustees of the Compensation Fund for a loss of \$7,523.95 where tickets valued at \$8,867.00 had been issued and the lower amount in cheques was received from Champlain Travel Services Ltd. in Pembroke. That company went bankrupt and the claim as made was received. From this event, Mr. Janigan noted that the Applicants accordingly would expect the Tin-Bo Toronto claim to be paid as similar circumstances prevailed.

In his argument, counsel for the Applicant reviewed the evidence and confirmed that there was no evidence that any of the passengers had not paid for their tickets. The debt of Tin-Bo Toronto was acknowledged by Henry Wong in his bankruptcy examination. Since an invoice went with the tickets and payment was expected by return of cheque, credit was not extended by Tin-Bo Ottawa and both Mr. Cheng and Ms. Lee gave evidence that they were not granting credit. Collection of the \$24,000 March amount was not pressed since no earlier problems had occurred. Since the Companies act at arm's length in the normal course of business by issuing cheques which are then deposited, counsel for the Applicant submitted that the Fund should pay this claim. Since the Fund would have had to pay if the trip was cancelled and passengers were repatriated from China, Mr. Cheng should receive his payment since he did not cancel and his business should not suffer from this event.

In his view, a plain reading of 15(3) sets out all the elements for payment to his client, and a narrow view bound by precedents should not prevail under the credit theme. In support of this view, he cited the case of Washington vs. The Grand Trunk Railway 1898 28 S.C.R. p.184, affirmed by 1899 A.C. at 275.

Counsel for the Trustees presented two reasons for the denial of these claims.

First, that the evidence discloses a claim or a portion of a claim which is a form of credit between Tin-Bo Ottawa and Tin-Bo Toronto.

Secondly, the consumer passengers were never at risk or in danger of not receiving their services.

He suggested that the Tribunal has the responsibility to be consistent, continuous and certain in the pattern of decisions

in this area and cited eight cases previously decided by the Tribunal which are summarized as follows:

1. Der Travel Service Limited
(1981) 10 C.R.A.T. 149

The advance of credit in the course of business brings a risk which the Fund will not insure. Such ordinary business losses become bad debts since the Fund exists to protect the consuming public.

2. 332531 Ontario Limited, operating as
Five Continents Travel Agency
(1983), 12 C.R.A.T. 270

An ongoing business relationship between the parties was continued when the travel agent was in debt to the travel wholesaler, and this was a de facto extension of credit so the claim is denied for otherwise the fund would be exposed to claims for trade losses and the standards of good business practice would be lowered.

3. Intragserve Limited, operating as
International Agency Travel Service
(1983), 12 C.R.A.T. 248

The agent failed to pass on the client's money to the wholesaler and after the trip was taken, went bankrupt. Since the ticket was passed from the travel wholesaler to the travel agent, some extension of credit must have occurred and compensation is refused since any extension of credit as such is unwarranted if the travel wholesaler making it expects to be protectively covered by the Fund.

Counsel suggested that to be successful, a claim must be based by a wholesaler having a loss where consumers are protected. There must further be no extension of credit and the wholesaler must nobly elect to proceed to his detriment in order to claim compensation from the Fund.

4. Tour East Holidays (Canada) Inc.
(1986), 15 C.R.A.T. 239

Where credit card vouchers are provided to the travel agent and are fraudulently filled out with forged signatures, and where the travel wholesaler pays for the tickets and claims from the fund a balance after part payment of a promissory note, the Fund will not recompense the travel wholesaler unless the client would otherwise have had access to the Fund.

5. Cosmopolitan Travel Bureau Ltd.
(1986), 15 C.R.A.T. 232

Where cheques are returned "NSF" and replacement cheques are also "NSF", the failure to cancel outstanding tickets or to demand payment in cash or certified cheque for new tickets will cause compensation to be denied to a travel wholesaler for the resulting business bad debt losses. Since the clients were never at risk and travel services were provided to them, the wholesaler had no claim against the Fund. Section 15(3) must be read in the context of the Act and in the context of preamble to Section 15(1).

6. United Travels
(1986), 15 C.R.A.T. 247

Where post-dated cheques were received and dishonoured, and the travel had been completed so the clients were never at risk, reimbursement from the Fund was denied to the travel wholesaler due to the extension of credit.

7. Penhale Travel Agency Ltd.
(1988), 17 C.R.A.T. 281

Where a travel agent working for another, takes in consumer payments in her company's name and fraudulently issues tickets owned by her employer and steals the proceeds, claims against the Fund were denied since the consumers all received their travel and were

never at risk.

8. Moreno Travel Marketing Ltd. operating as
Good Time Holidays and Celsius Travel West Inc.
(1988), 17 C.R.A.T. 264

Where a "red alert" is issued to warn of the need to receive only cash or certified cheque from a travel agent; and this is claimed not have been received by a travel wholesaler; the continuing issuance of tickets without receiving payment and the fact that the various clients were not at risk and did travel prevents the travel wholesaler from claiming against the Fund for repayment of uncertified cheques which were not honoured.

The claim for travel services provided, a total of \$108,004.85, consists of two claims: a) \$24,489.40 for March 1988 tickets and b) \$83,515.45 for the April 4, 1988 China Tours.

While the two claims as shown later are interlocked, we have considered them separately:

- a) Previous decisions by the Tribunal as submitted by counsel for the Board, clearly state that the Compensation Fund is not a Business Insurance Fund against losses sustained in the normal course of business, such as the granting of credit. Based on evidence provided during the hearing, including the testimony of witnesses called by the Applicant, the non-payment of \$24,489.40 by Tin-Bo (Toronto) for March 1988 tickets at the time of the delivery of the tickets, reminders by telephone notwithstanding, constitutes a credit arrangement granted at the risk of 619513 Ontario Inc., and, therefore, does not qualify as a claim against the Compensation Fund.
- b) The China Tour tickets were delivered by Mr. Cheng of 619513 Ontario Inc. to Mr. Wong, Tin-Bo (Toronto) on Good Friday, April 1, 1988 and payment was received by cheque for \$83,515.45. Mr. Cheng who acted as guide to the April 4, 1988 China tour, collected the tickets prior

to departure on Easter Monday, April 4. It is Mr. Cheng's contention that due to the holidays, it was not possible to have the cheque certified, which eventually was rejected as "NSF" while the tour was in progress. The non-payment by Tin-Bo (Toronto) of the several weeks overdue amount of \$24,489.40 should have prompted Mr. Cheng to act more prudently. The tickets could have been delivered on Wednesday or Thursday, March 30, 1988 or March 31, 1988, allowing sufficient time to have the cheque in payment of same certified.

Alternatively, Mr. Cheng should have retained the tickets when he found that the cheque was not certified, thus putting Tin-Bo (Toronto) clients at risk. He then could have provided the travel services thus protecting the clients and so qualified for compensation from the Compensation Fund under Section 15(2).

By the time Mr. Cheng was informed that Tin-Bo (Toronto) was declared bankrupt, the tour was almost completed, and the clients were not at risk of having the travel services withdrawn for which they paid Tin-Bo (Toronto). It is unlikely that Mr. Cheng could have cancelled the return portion of the air-fare. China Air would hardly have accepted such a cancellation, even under the threat of Mr. Cheng withholding payment from China Air, a step which would have put his relation with China Air into jeopardy and ruined his business reputation.

The Tribunal finds that Mr. Cheng did not act in a prudent business like manner in the matter of the tickets for the China tour and took a calculated risk in accepting a non-certified cheque when he should have been suspicious of the financial stability of Tin-Bo (Toronto), having been unable to collect the overdue debt of \$24,489.40 before the China Tour.

By virtue of the power vested in it under Section 16(3) of the Schedule to revised Regulation 938 under the Travel Industry Act, the Tribunal disallows the claim.

DISSENTING DECISION

The following is the decision of Mr. Peter Bonch, Member:

There is no question in my mind that the claim by 619513 Ontario Inc. against the Board of Trustees is a Trade debt and not a consumer debt. Although 619513 Ontario Inc. denies that they extended credit to Tin-Bo Travel (Toronto), I also believe that they had in practice allowed Tin-Bo Travel (Toronto) to be in possession of valid travel documents before securing cash in their bank for payment. This is in essence extending credit.

Unfortunately, the Travel Act does not make any mention of disallowing Trade debts or extending credit under section 15, or any other section of the Act. It has been left up to past Tribunals to use their judgement in allowing claims or disallowing claims. The examples brought forward by counsel for the Board of Trustees are weak in nature because of their rather blatant examples of poor business judgement:

Example

ONE	Der	- Did not attempt to collect debt immediately
TWO	Five Continents	- Employee error or theft
THREE	Intragserv	- Did not attempt to collect debt immediately
FOUR	Tour East	- Fraud
FIVE	Cosmopolitan	- Lack of concern in collecting
SIX	United Travel	- Accepted postdated cheques
SEVEN	Penhale	- Fraud
EIGHT	Moreno	- Ignored Red Alert

In all cases presented by Mr. Lipton, the claimants did not exhibit good business judgement, failed to attempt to collect a debt, or were robbed. There was no attempt to suggest that there was fraud, collusion or any other lack of concern in collecting monies by 610513 Ontario Inc.

Although the clients did receive their vacation as paid for, could 619513 Ontario Inc. have denied them their vacation? In my estimation, the answer would be yes - 619513 Ontario Inc. could have, and probably should have denied Tin-Bo (Toronto) clients their tickets. Could 619513 Ontario Inc. have notified the Registrar on April 1, 2, 3 or 4, 1988, of this denial of passage? No - there is no mechanism generally known or published in the trade unless you are party to the Registrar's home number personally. There is no instant triggering system in place to

allow off-hour crisis solving for anyone but the very large wholesalers and there should be.

There was no suggestion by Mr. Lipton that delivery of tickets in exchange for cheques on a holiday could have been an attempt to circumvent good business practices. The facts are:

- 619513 Ontario Inc. is
- a duly registered wholesaler eligible to participate in the fund.
 - Acted at arms' length
 - Acted in Good faith
 - The travel agent failed to pass his clients' money to the wholesaler
 - provided the travel service contracted for (but not paid for) to the client.
 - is not claiming commission.

Had 619513 Ontario Inc. accepted a cheque on a banking day and not certified it immediately, I would say that they did not act in good faith to protect the consumers' money, but this did not happen. Therefore, in the matter of the cheque for \$84,073.00, this should be reimbursed to the claimant as 619513 Ontario Inc. had no reasonable chance to protect the clients' money or notify the Registrar of denial of passage.

In the matter of all other claims - they be denied as clients had travelled, could not have been denied travel or otherwise inconvenienced to collect monies owing.

I also feel that the Registrar should be told to ask for articles in the Act to cover the interpretive areas of trade debts and extension of credit. As article 15(3) reads now, trade debts (are) covered between a travel agent and a travel wholesaler as defined in the Act. It should also be noted that taxes (service charges) are part of the claim allowed.

For these reasons, it is my opinion the Tribunal should allow the claim of 84,073.00 (which includes taxes but not commission) and should disallow all other claims.

Note: The decision wherein the majority dismissed the Applicant's claim was appealed to the Supreme Court of Ontario (Divisional Court) by the Applicant. The appeal had not been concluded at the time of this publication.

NICK VOLOS TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ARTHUR GARNER, Member

APPEARANCES:

JAMES A. GIRLING, representing the
Registrar of the Travel Industry Act

No one appearing for the Applicant

DATE OF

HEARING: 15 February 1989

Toronto

REASONS FOR DECISION AND ORDER

This Tribunal has deliberated with respect to this application. It has noted that the Applicant who was to be represented by its Director, Mrs. Zissopoulos has not been in attendance. The Tribunal notes that ample opportunity has been given to Mrs. Zissopoulos to be present, that undertakings were given to counsel for the Registrar that she would be appearing by 11:30 this morning. It is now 3:25 in the afternoon and Mrs. Zissopoulos has not been present, nor has there been any message from her in regard to that non-attendance.

The Tribunal, therefore, would be of the view that it could accept this non-appearance as virtually a withdrawal of the application against the Proposal of the Registrar, but it is not doing so as such. It is dealing with the matter on its merits.

The evidence presented to the Tribunal clearly indicates that the Corporation for which application for registration is being made, Nick Volos Travel Inc., has been carrying on business as a travel agent in contravention of the Act notwithstanding an undertaking given by its solicitor, Mr. Jaskula under date of July 6th, 1988, that "In any event our client does not intend to contravene any of the Travel Industry Act provisions or regulations. He will cease and desist as requested." It is to be noted that this letter which was

addressed to Mr. Buckley has on the face of it a carbon copy to Nick Volos Travel Inc. and no statement has been made by the Applicant denying receipt of this letter for the undertaking therein.

The evidence of Mr. Buckley has been that investigators from the Registrar's office under the Travel Industry Act attended subsequent to this date of July 6th, 1988, at the premises identified in Hamilton as Nick Volos Travel Inc. at 641 King Street East in the City of Hamilton. And on the occasions upon which the investigators attended, evidence revealed that there were travel brochures displayed and travel services were being offered to the general public.

In addition, the Tribunal has heard direct evidence from Mr. Ladas, a neighbouring travel agent, to the effect that as recently as the past month, customers of his operation who have been former customers of Nick Volos Travel Inc. have been asking for services which have been promised by Nick Volos Travel Inc. and not delivered within this past month. Other witnesses have also confirmed a continuing operation since that July date.

The Tribunal recognizes the provision of Section 4 of the Travel Industry Act which permit registration as a travel agent of a corporation except where the Registrar finds certain facts. These facts consist of the following:

having regard to its financial position,
it cannot reasonably be expected to be
financially responsible in the conduct of
its business.

The evidence before the Tribunal has indicated that this Applicant itself, without considering the previous registrations of its principal Mr. Zissopoulos, has failed to pay its financial obligations which it incurred, even though irregularly, as a travel agent.

The second condition which provides an exception is where,

the past conduct of its officers or
directors affords reasonable grounds for
belief that its business will not be
carried on in accordance with law and
with integrity and honesty.

This Tribunal finds as a fact that Nick Zissopoulos is the Manager of Nick Volos Travel Inc. and is an officer of that corporation. Ample evidence has been presented to this Tribunal that Nick Zissopoulos has not carried on business in accordance with law and with integrity and honesty in the past operations with which he has been connected. And in particular notes the similarity and in fact as identified by Mr. Hadjiyannakis, the identical names (in Greek) under which the business has been carried on.

With respect to the conduct of Joanne Zissopoulos, who is shown as a director and shareholder of the corporation, this Tribunal finds that her statements in her application are somewhat suspect and intending to be misleading. The Tribunal can also take notice of the communication which has been made to this Tribunal today by Mrs. Zissopoulos, which also indicates a lack of integrity and honesty. Therefore, on both the grounds of Mr. and Mrs. Zissopoulos' activities, the Tribunal believes that the Registrar can find and did so find that the past conduct of its officers or directors afforded reasonable grounds for belief that the business of Nick Volos Travel Inc. would not be carried on in accordance with law and with integrity and honesty.

The final grounds are where the Applicant is carrying on activities that are or will be, if the Applicant is registered, in contravention of this Act or the Regulations. The evidence before the Tribunal has clearly indicated that the Applicant is aware of the fact that it cannot operate without being registered. Its solicitor acknowledged that it was not registered and yet the evidence before the Tribunal clearly indicates a continuation of holding itself out as a travel agent. Clearly this Applicant has indicated that it is carrying on activities in contravention of the Travel Industry Act.

Therefore, by virtue of the authority vested in it under Section 6(4) of the Travel Industry Act, the Tribunal directs the Registrar to carry out his Proposal.

MR. AND MRS. AHMED

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
D.H. MACFARLANE, Member

APPEARANCES:

P.A. MAHONEY, representing the Applicants

BRIAN M. CAMPBELL and CAROL A. STREET,
representing the Ontario New Home Warranty Program

DATE OF

HEARING: 27 October 1988

Toronto

RULING - RE COSTS

This is a matter on which a Ruling was delivered by the Tribunal on October 27th in which the Tribunal granted an adjournment sine die at the request of counsel for the Ontario New Home Warranties Plan Act.

The issue of costs with which we are now seized might never have arisen if the Program's solicitor had been able to advise the Applicant's solicitor of his intention to seek an adjournment. Notice of this intention was given only the day before this hearing was scheduled to begin. We can therefore understand the concern expressed by Mr. Mahoney, counsel for the Applicants, who points to the considerable expense incurred by the Applicants and his witnesses, all of whom were present at the hearing. Mr. Mahoney further requests that his clients be compensated for their out-of-pocket expenses, either by an award of costs thrown away or in direct compensation from the Fund. It is to be noted that Mr. Ahmed travelled from Winnipeg specifically to attend this hearing.

Mr. Campbell, counsel for the Program, argues that the Tribunal has no jurisdiction to award costs and, in any event, any decision concerning compensation or indemnity would be premature since the matter of the Program's liability had not been adjudicated and was very much in issue.

The Tribunal understands the position of Mr. Campbell who relies on the lack of any authority empowering us to award costs. At the sametime, we are acutely aware, of the considerable, and as it turns out, unnecessary expense incurred by the Applicants. It is an unfortunate incident, but we can impute no fault to either side.

It appears that until the day before this hearing, the Program was prepared to proceed as were the Applicants. Mr. Campbell, however, learned only that day the Applicants had issued a claim on July 5th, 1988, in the District Court at St. Catharines against the builder Silverstar Homes Incorporated. On August 22nd, 1988, a Statement of Defence and Counterclaim was filed by the defendant Silverstar against the plaintiffs. The claims embodied in the plaintiffs' claim are identical to their claims against the Program, although including the broader allegation of negligence. In the light of this information, the Program sought the adjournment.

Having considered the issues involved in both actions and the obvious duplication, the Tribunal adjourned the matter sine die since it was sub judice in the higher court and all issues might be decided there. If, however, any claims remained outstanding against the Program after that adjudication, the matter could proceed before this Tribunal. The Reasons for the adjournment need not be further amplified here except to say that the possibility of inconsistent decisions is to be avoided since the purpose of litigation is to end it. The Tribunal's decision has now occasioned Mr. Mahoney's plea for costs or, as he would rather phrase it, "compensation".

It must be noted that the Tribunal's jurisdiction comes from the Statutory Powers Procedure Act and the particular statute under which the applicant's appeal is taken. Under section 21 of the Statutory Powers Procedure Act, "A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held". There is, however, no reference to costs or compensation to those aggrieved by the adjournment. In other words, there is simply no authority under which costs or compensation might be awarded.

The appeal is brought under the Ontario New Home Warranties Plan Act. Knowing nothing of the merits of the case, or why conciliation was not effective in resolving it, we cannot assess liability. A court of law in a similar

circumstance would probably order costs in the cause. We do not, however, have that prerogative. We are bound by the limits of liability found in section 6 of the Ontario New Home Warranties Plan Act. Subsection 4 of section 6 refers to "damages arising from a claim under section 14(1)(b) or (c) of the Act" and specifically refers to damage to the home. A further definition of damage is found at subsection 6 which says "liability under subsection 4 is limited to damage to the home only". There is provision for no further compensation.

If, however, the Applicants can bring themselves within section 14(1)(a) of the Act which provides:

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

then there appears to be an area where they might receive that compensation from the Fund which they seek today as part of their damages. It is, however, premature to comment on this possibility which may arise at a later hearing.

We are, therefore, of the view that the Applicants' claim for costs or compensation must be disallowed, but this decision is without prejudice to raise the issue again in the event this matter is brought back to the Tribunal after adjudication by the District Court.

APPLEBY TRAVEL SERVICES LIMITED

APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REVOKE THE REGISTRATION
AND FOR AN ORDER OF TEMPORARY SUSPENSION

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
MICHAEL E. LERANBAUM, Member
KEITH COPPARD, Member

APPEARANCES;

ALEXANDRE BROOKS, representing the Applicant

JANE WEARY, representing the Registrar under the
Real Estate and Business Brokers Act

DATE OF

HEARING: 5 September, 1989

Toronto

REASONS FOR RULING

This is an appeal from the Proposal of the Registrar, Travel Industry Act, pursuant to Section 6(1) of the Act, to revoke the registration, which Proposal is dated the 15th day of August, 1989, and more particularly, the Order which the Registrar made under that Act for temporary suspension in accordance with Section 7 of the Travel Industry Act. That Order was dated August 15th, 1989, and pursuant to that section we are here today to consider the Order and whether that suspension should be removed until this matter is heard in full by the Tribunal.

We have before us the Registrar, who has the view under the terms of the Proposal, of the serious errors that Mr. Ladwig has made over a number of years in not taking the requirements of the Registrar to heart and in not completing various matters which were requested of him because of the need to have thorough and accurate records that are available to the Registrar. The Registrar quite naturally looks at these matters as those of consumer protection, because the necessary complete filings are there as a basis upon which fees under the consumer protection fund legislation may be assessed based upon the volume of business which is done by each travel agency in Ontario.

The result of this lack of response by Mr. Ladwig on many occasions has meant continuous work for the Registrar's staff and has brought us here today because of the temporary suspension which has been invoked. In addition, we noted that the books and records have not been always available and the matter of the I.T.P. signage question has also come to the Registrar's attention because of the lack of follow-up which Mr. Ladwig has shown in not getting on with looking seriously at the requests made of him by the Registrar.

We recognize that these two themes of financial records and the I.T.P. signage have some impact on the consumer protection involvement that this whole statute brings. The Fund is, of course, based upon the actual records and assessments that are provided by the various travel agents and the Registrar is unable to complete his tasks unless this information is provided. It is clear from what Mr. Brooks has said as counsel for Mr. Ladwig that if this present procedure has not got his attention, we don't know quite what will. I would expect that Mr. Ladwig has probably lost some \$10,000 because of his business being closed and because of the loss of winter travel bookings which might well have been in place at this time of year. We, however, do not wish to destroy Mr. Ladwig.

Reference had been made to the case of Steve Aslanidis (Thessaloniki-SKG Travel Service) reported at page 284 CRAT Summaries of Decisions Volume 16. In this matter, the Tribunal was again faced with a proposed temporary suspension and since there had been no complaints from the public with reference to that registrant, the Tribunal said at page 285, "The Tribunal in deciding must weigh the balance of interest as between the registrant and the public, and in this case, the Tribunal has concluded that the public would not be at any risk pending final determination of this issue."

The Tribunal has considered the evidence with respect to the lifting of the suspension and we agree with the approach which was taken in the Aslanidis case. Accordingly, the Tribunal has decided to remove the suspension and grant a stay of that on condition that the necessary financial statements as set out in the letter of Mr. Lawrence to complete the write-up of original books for the 1988 calendar year, to complete the annual financial statement as at December 31, 1988, and to complete the interim statements up to July 31, 1989, are all completed by September 30th, 1989 and that the suspension will be re-imposed if those materials are not then in the hands of the Registrar until a hearing which can be brought back on 10 days' notice to a date to be fixed by the Registrar of this Tribunal.

JOHN D. COWARD and
JOHN D. COWARD ENTERPRISES LIMITED
(JOHN D. COWARD AUTOMOTIVE RETAILERS)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

TO REVOKE THE REGISTRATIONS

AND RE: GLENN A. McEACHERN

TRIBUNAL: DAVID APPEL, Vice-Chairman, presiding
HELEN J. MORNINGSTAR, Member
J.T. HOGAN, Member

COUNSEL: EARL J. LEVY, Q.C., representing the Applicants
JAMES A. GIRLING, representing the Registrar
of Motor Vehicle Dealers & Salesmen

DATE OF
HEARING: 21 September 1989 Toronto

REASONS FOR RULING

Counsel for all parties have agreed that the present case be postponed.

Mr. Earl J. Levy, Q.C., counsel for John D. Coward, has made a motion that the case not only be postponed sine die, but not be put on for hearing until after disposition of the Crown appeal against sentence and Mr. Coward's cross-appeals against conviction on Criminal Code charges.

Counsel for the Registrar opposes this motion and asks that this matter be put on for hearing at the earliest possible date.

Mr. Levy, counsel for Mr. Coward, informed the Tribunal that his client had been convicted under the Criminal Code of paying secret commissions to Glenn A. McEachern. Pursuant to this conviction, Mr. Coward was given a suspended sentence and ordered to make restitution of the amount of the monies (approximately \$25,000) which he had received. Counsel further informed the Tribunal that his client was making restitution payments pending the hearing of the appeal.

Counsel argued that the hearing before this Tribunal should be suspended until judgement in the appeal was rendered, because the appeal might very well overturn the conviction and, in such event, the Registrar would no longer have any basis for revoking the registration of Mr Coward. Counsel argued that if Mr. Coward were found not guilty of the offence, then, automatically, he would also be innocent of any wrong-doing under the Motor Vehicle Dealers Act.

Mr. Girling argued on behalf of the Registrar that the motion to adjourn should not be suspended until the outcome of the appeal. He did believe, however, that an adjournment should be granted until the transcripts of the trial at first instance were available.

Counsel argued that Mr. Coward no longer benefited from a presumption of innocence (a proposition with which counsel for Mr. Coward also agreed) and, therefore, his rights flowing from that presumption would no longer be prejudiced in any hearing before the Tribunal. He argued, moreover, that even if Coward succeeded in his appeal, it would not necessarily decide the validity of the Registrar's Proposal. The past conduct of Mr. Coward, even if not criminal, still demonstrated a lack of integrity giving the Registrar the right to propose the revocation of Mr. Coward's registration.

The Tribunal believes that its first duty is to hear cases within its jurisdiction, and to do so in as expeditious a manner as possible. Postponing a case sine die is, therefore, an exception which must be granted for only the most compelling reasons.

The Tribunal believes that this case should not be suspended sine die, but rather should come on to the roll to be fixed for hearing upon notice to the Registrar that the transcripts of the first trial have been deposited. There is no Act or case law which holds that the fact that Mr. Coward has appealed his first conviction to the Court of Appeal obliges the Tribunal to suspend the hearing until such time as an appeal is rendered.

In fact, the relevant case law holds the opposite. In the case of Hewson v. The Queen, the Supreme Court had to decide whether the Supreme Court of Ontario had erred in finding that the Applicant was not prejudiced in his right to a fair trial by the improper admission of a previous conviction of the Applicant which was at the time of trial under appeal, and which was set aside subsequently. The Supreme Court of Canada found that the Supreme

Court of Ontario had not erred in admitting the previous conviction of the Applicant.

Mr. Justice Ritchie, who delivered the majority opinion, held as follows at p.516 of Hewson v. The Queen, Canadian Criminal Cases, 42 C.C.C.(2d):

It is contended, however, on behalf of the appellant that the fact that the conviction in question was under appeal resulted in any evidence relating to it being inadmissible. In support of this contention reference is made to a number of American authorities, but it will be found that the great weight of judicial opinion in that country is to the contrary effect. In the course of his reasons for judgment, Mr. Justice Spence refers to the case of Suggs v. State of Maryland (1969), 250 A. 670, and I quote from the reasons for judgment of the Court of Special Appeals of Maryland in that case in the paragraph immediately preceding that which is cited by my learned brother. It is there said [at p. 672]:

It appears to be the majority rule that it is permissible to attack the credibility of a witness by showing the fact of a previous criminal conviction even though an appeal therefrom is then pending. The rule is bottomed upon the premise that unless and until the judgment of the trial court is reversed, the defendant stands convicted and may properly be questioned regarding that conviction. The cases are collected in an Annotation at 16 A.L.R. 3d 726-728.

The 1974 conviction here at issue was under appeal at the time of the hearing of the present case and in my view the fact that the appeal was subsequently allowed and a new trial directed cannot affect the admissibility of the evidence respecting it.

It is true that there has been no express judicial determination in Canada as to the right to adduce evidence against an accused person of a previous conviction, which was the subject of appeal at the time of the Trial. In this regard every consideration must be given to the provisions of s.318(1) of the Criminal Code which is quoted above.

In my view, a previous conviction cannot be excluded from the operation of this section on the sole ground that a notice of appeal had been entered against it. If it were otherwise, it would only be necessary for a convicted person to file a notice of appeal in order to sterilize his conviction from the operation of the section at least until such time as his appeal was disposed of, and with all respect, I am unable to accept a proposition which could lead to such a result. I would accordingly answer the third question in the negative.

The Tribunal believes that based on the preceding judgement, the Registrar is entitled to have the present case fixed for hearing and that Mr. Coward is not entitled to the adjournment he seeks. Having been convicted at first instance, the presumption of innocence no longer exists. The hearing before this Tribunal, therefore, would not be a cause of prejudice to Mr. Coward.

It should also be noted that even in the event that Mr. Coward should succeed in his appeal, the facts which gave rise to the initial conviction, might still be such that they did not demonstrate honesty and integrity as contemplated by the Motor Vehicle Dealers Act.

Conversely, even if Mr. Coward's conviction is sustained in the Court of Appeal, the acts which gave rise to that conviction might not be sufficient to justify the Registrar in his Proposal to revoke the licence of Mr. Coward. It is precisely this matter which the Tribunal will be called on to decide.

At the final hearing on the merits, the Tribunal could still come to the conclusion that the case be adjourned until the appeal is decided, based on the evidence which comes out at that hearing. The only question before this Tribunal, on this date, is whether the fact of the appeal is sufficient to give rise to a motion to adjourn this case until that appeal is disposed of.

Finally, the nature of this case is one dealing with a regulated industry where the protection of the public is paramount. Delaying findings on such questions as "who should be registered", and "how will the public be affected", should not be delayed. If this Tribunal were to automatically grant the motion to suspend until the final appeal which might be to the Supreme Court of Canada, this case might not be heard for a number of years.

The Tribunal finds that it is equitable and just that the case be put on the roll for hearing, at a date to be fixed after transcripts from his first trial and conviction are deposited with the Tribunal.

CREDIT VALLEY CONTRACTING CORP.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT
TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
HELEN J. MORNINGSTAR, Member
D.H. MacFARLANE, Member

COUNSEL: R.J. ROGERS, its agent

NETANUS T. RUTHERFORD, representing the Registrar
under the Ontario New Home Warranties Plan Act

DATE OF
HEARING: 25 January 1989 Toronto

REASONS FOR RULING

On November 4th, 1988, the Ontario New Home Warranty Program asked for a postponement of the present case and the postponement was granted. At that time Credit Valley Contracting Corp.'s registration continued to be in effect pending hearing and judgment of this Tribunal on the merits of the Proposal of the Registrar to revoke Credit Valley Contracting Corp.'s registration. Under the status quo, as it then was, Credit Valley Contracting Corp. continued to act as a builder of homes. Had the hearing taken place, the Commercial Registration Appeal Tribunal would have decided in a definitive manner, whether the registration should have been revoked. If it then decided against revocation, Credit Valley would have been allowed to continue as a builder and to receive a renewal of registration, so long as none of the conditions had changed. The Ontario New Home Warranty Program however, sought a postponement whose effect was to defer the hearing.

Since the postponement, Credit Valley's original registration has expired and it only applied to renew it on the 20th day of January, 1989. The failure to renew was either the result of Credit Valley's receiving incorrect information from an employee of the Ontario New Home Warranty Program or misinterpreting the information. In any event, the Ontario New Home Warranty Program is now seeking to withdraw its Proposal, thereby depriving Credit Valley of its right to a hearing on the merits. At the same time, Credit Valley would cease to have the right to be a builder until its new application is

granted by the Ontario New Home Warranty Program or by this Tribunal at an even later date, should the Ontario New Home Warranty Program make a Proposal to refuse renewal or registration. In the meantime Credit Valley would be unable to carry on business.

The result of the foregoing would have as its consequence that Credit Valley will have been deprived of its right to be a builder without a fair hearing. This situation would never have arisen had the Ontario New Home Warranty Program proceeded with the hearing on November 4th, 1988. It would be unjust and against the spirit and purpose of the Ontario New Home Warranty Act to allow this to occur.

This applies even more since the Ontario New Home Warranty Program now seeks a further postponement if it cannot withdraw its original Proposal.

The Tribunal holds that the Registrar may not withdraw his Proposal since it has been contested by Credit Valley. The resolution of such contestation would also affect Credit Valley's right to a future renewal. Credit Valley is entitled to a full hearing on the issue of its right to retain its registration. This is especially the case in the present situation where, to allow the Registrar's desire to withdraw his Proposal, would result in Credit Valley being deprived of its right to be a builder.

The Tribunal believes that Credit Valley is entitled to the same status quo as existed at the time of the postponement November 4th, 1988. It is to be noted that Credit Valley was prepared to proceed today.

The Tribunal, therefore, does not allow the Registrar to withdraw his Proposal, but grants the Registrar's request for a postponement subject to the following conditions:

1. The panel will be seized of this matter.
2. The hearing will be fixed for February 16, 1989 peremptorily.
3. If any further Proposal is issued by the Registrar with respect to the new application by Credit Valley it will be consolidated with the present Proposal and dealt with at the hearing on February 16th, 1989.
4. Until the present Proposal has received a final judgment by this Tribunal, Credit Valley will be subject to the status quo as it existed on November 4th, 1988 and shall enjoy all the rights and obligations which thereby accrued to it.

PATRICK A. DOHERTY

APPEAL FROM THE PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, presiding
GORDON R. DRYDEN, Member
JOSEPH STRUNG, Member

APPEARANCES: PATRICK A. DOHERTY, appearing on his own behalf

ALVIN TORBIN, representing the Registrar of
Real Estate and Business Brokers

DATE OF

HEARING: 21 November 1989

Toronto

RULING RE ADJOURNMENT

The panel has considered the request for an adjournment and we do not find it an easy question to decide. However, we took into consideration that the nature of this application is a Proposal to refuse registration, and that, therefore, at this time Mr. Doherty is not registered as a real estate salesman and not a potential danger to the public. There is no risk to the public at this stage and the granting of the adjournment would not create any such risk.

It is clear to us that a request for an adjournment was submitted by Mr. Doherty at an early stage once he was advised of the hearing date. It is equally clear to us that Mr. Torbin made it clear to Mr. Doherty that the request for an adjournment would be opposed. It is also clear that Mr. Doherty was given fair and adequate disclosure on November 10th, save and except that he was not handed over certain legal authorities which counsel had voluntarily agreed to provide. Nonetheless, we are left with a situation where we have an Applicant who clearly wants to be represented by counsel and is not today represented by counsel. If he had organized himself a bit better, maybe he would have had counsel, but nonetheless under all the circumstances, the panel members feel that an adjournment ought to be granted in this instance.

The Tribunal peremptorily adjourns the hearing to reconvene at the Tribunal Chambers, 1 St. Clair Avenue West, 10th floor, on the 27th day of November, 1989 at 9:30 a.m.

NORBERT H. DUECK

APPEAL TO DIVISIONAL COURT FROM A
DECISION OF THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

AN APPLICATION TO STAY THE DECISION OF THE TRIBUNAL
UNTIL THE HEARING OF THE APPEAL

TRIBUNAL: MARY G. CRITELLI, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
HERBERT KEARNEY, Member

APPEARANCES:
BARRY T. PAQUETTE, representing the Applicant
JANE WEARY, representing the Registrar under the
Motor Vehicle Dealers and Salesmen Act

DATE OF
HEARING: 13 July 1989 Toronto

REASONS FOR RULING

This was an application pursuant to Section 7(9) of the Motor Vehicle Dealers' Act for a stay of the order of the Tribunal dated June 29, 1989, directing the Registrar to carry out his Proposal to revoke the Applicant's registration as a motor vehicle salesman.

The parties agreed that the test to be applied in considering whether or not a stay should be granted is that which is set forth in Re Great Northern Capital Corporation Ltd. et al and City of Toronto et al, (1973) 10R (2nd) page 160 as follows:

The factors to be considered on an application for stay are the bona fides of the appeal, the substance of the grounds for appeal and the hardship to the respective parties if such a stay were granted or refused.

It was conceded by counsel for the Registrar that the first two tests had been met and that the Tribunal had only to consider the respective hardship to the parties that would, on a balance of probabilities, result if the stay were granted or refused.

It was further conceded by the Registrar, who testified on the application for the stay, and by the Registrar's counsel,

that under the conditions of the Applicant's present employment (from which he has been temporarily suspended pending the outcome of this application), there is no real possibility of risk to the consumers, wholesalers or other members of the public with whom the Applicant deals. In his present position as an employee of Keyeswetter Motors in Kitchener, the Applicant has no cheque signing privileges and no other control over funds that are received or paid out by the dealership. The Applicant also testified that he is strictly an employee of the said dealership and has no financial interest whatsoever in it.

It was submitted on behalf of the Registrar that the public perception of the industry, and of the regulation of the industry, would be harmed if a stay were granted thereby permitting the Applicant to continue to participate in the industry pending his appeal to the Divisional Court. The Tribunal accepts that there may be a vague possibility of such harm to the public perception occurring; however, there was no evidence called by the Registrar to support this apprehension and the Tribunal is unable to conclude that such harm would, on a balance of probabilities, occur.

On the other hand, the Applicant is a 53 year old man who has spent virtually all of his working life in the motor vehicle industry. His evidence that he and his wife have no alternative source of income was not seriously contested by counsel for the Registrar nor did counsel for the Registrar challenge the Applicant's evidence that, unless he continues to work at Keyeswetter Motors, he will be unable to afford to proceed with the appeal he has launched to the Divisional Court in respect of the Tribunal's order.

Based on the facts in evidence before it, the Tribunal must, therefore, conclude that, on the balance of probabilities, the hardship that would result to Mr. Dueck if the stay were denied outweighs any possible harm to the public perception of the industry that might result if the stay was granted. Accordingly, the stay will be granted, but on conditions.

Since the stay has been granted in reliance upon the Applicant's evidence that he will continue to be employed at Keyeswetter Motors (where he does not have cheque-signing privileges or other control over the dealership's funds), the stay will remain in effect only as long as this status quo remains.

Furthermore, the appeal must proceed without any unnecessary delays. From the information provided to the panel by

counsel for the Applicant, it would appear that a reasonable time limit on the stay would be eight months. If the appeal has not been disposed of within that time period despite all reasonable efforts being made by the Applicant to expedite the appeal, then the Applicant shall be at liberty to make further application to the Tribunal for an extension of the stay.

NORBERT H. DUECK

HEARING TO CONSIDER AN APPLICATION TO VARY
THE ORDER GRANTING A STAY OF THE DECISION
OF THE TRIBUNAL

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
MICHAEL E. LERANBUAM, Member
KEITH COULTER, Member

APPEARANCES:

BARRY T. PAQUETTE, representing the Applicant

JANE WEARY, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 6 September, 1989

Toronto

ORDER

Upon hearing submissions on behalf of the Applicant and the Registrar, the Tribunal directs that there will be a stay of the Order of the Commercial Registration Appeal Tribunal upon the following terms and conditions:

1. The stay shall continue as long as the Applicant shall be employed by Royal City Motors, Guelph and in the event he is not, or wishes to change his employment, that he obtain the Registrar's permission for future employment with another motor vehicle dealer;
2. The appeal must proceed without delay;
3. If the appeal has not been heard within twelve months from the date hereof, the Registrar shall review the Applicant's registration and impose whatever conditions he may in his discretion consider necessary.

577029 ONTARIO LIMITED and
577030 ONTARIO INCORPORATION
(STUDIO ONE HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LIQUOR LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

GEORGE A. MARRON, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 7 April 1989

Toronto

REASONS FOR RULING

There are two preliminary issues before us today: first is an application for adjournment and the second is a motion by counsel for the Applicants that the Chairman disqualify himself from hearing this matter on the merits.

The Tribunal reserved decision on the latter motion, but has agreed to the adjournment on consent of both counsel. When the matter came before the Tribunal in Niagara Falls on November 28th last, Mr. Marron, counsel for the Applicant argued that he could not proceed that day having just been retained as counsel by the Applicant whose previous counsel was otherwise engaged. The Tribunal was not disposed to grant the adjournment, but since counsel maintained he was not in a position to proceed, the adjournment was granted and the previous Order of the Tribunal was reversed as a result of which the Applicant's Hotel was ordered to close forthwith.

Mr. Marron appealed the Tribunal's decision to the Weekly Court in Toronto and the Court reversed that decision. The Hotel has remained open and the proceedings adjourned for hearing to this date.

Although it was expected the hearing in Niagara Falls would take two or three days, counsel had submitted that by agreeing on certain facts, the evidence would be considerably abbreviated and the hearing set for Toronto could possibly be concluded in one day. Accordingly, the Registrar set only one day for this appeal and we are now advised by counsel that it is expected to continue for at least two and possibly three days. It is, therefore, in the interests of all parties that the matter be adjourned.

The second issue, that of Mr. Marron's motion, has been considered by the Tribunal this morning. Although its decision has been made, Mr. Marron has now graciously withdrawn his motion. A Chairman feels, however, that the motion should be granted not because of the existence or evidence of any bias, but because of the possible apprehension of bias which may rest in the minds of the Applicants. It is not only vital, but imperative, that in any board, tribunal or court, justice be done and also be seen to be done. It is clear that the Applicants would not be comfortable with the present Chairman hearing the matter on the merits because of his participation in the Niagara Falls decision, even though his is only one voice among three.

It is for that reason and that reason only that the Chairman will not continue to sit on this matter and will be replaced by another. These proceedings are now adjourned until June 27th next.

577029 ONTARIO LIMITED
577030 ONTARIO INCORPORATED
(STUDIO ONE HOTEL)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LIQUOR LICENCE

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
ROBERT COWAN, Member

APPEARANCES:

GEORGE A. MARRON, representing the Applicants

MALCOLM A.F. STOCKTON, on behalf of Mr. D.A. Crowe
(solicitor of record)

RICHARD E. KULIS, representing
the Liquor Licence Board

DATE OF

HEARING: 28 November 1988

Niagara Falls

REASONS FOR RULING

This is an appeal by Studio One Hotel from the decision of the Liquor Licence Board dated September 1st, 1988 revoking the liquor licence issued to 577029 Ontario Limited and 577030 Ontario Inc. which operated that hotel.

The Notice of Appeal is dated September 14th, 1988 which the Tribunal received from Mr. David A. Crowe, counsel for the Applicants. In reply, Mrs. Audrey Verge, Registrar of the Commercial Registration Appeal Tribunal advised Mr. Crowe on October 20th and October 25th of the date set for the appeal which was November 28th, 1988. Mr. Crowe's response was to the effect that he would be tied up on a custody trial that week and could not appear. He, therefore, requested an adjournment. Mr. Grannum, on behalf of the Liquor Licence Board, advised Mrs. Verge on November 4th that he was instructed to oppose any adjournment and a copy of this correspondence was directed to Mr. Crowe.

The Registrar further advised Mr. Crowe on November 4th, 1988 that the Tribunal would proceed to hear the matter on November 28th. Mr. Crowe's reply of November 7th to the

Registrar was simply that he could not appear and it was not possible to turn the matter over to junior counsel. Mr. Richard Kulis in a letter to the Registrar, dated November 15th, confirmed the intention of the Liquor Licence Board to proceed and oppose any adjournment. A copy of this letter was directed to Mr. Crowe on November 16th. The matter, therefore, came before the Tribunal as scheduled on November 28th.

Mr. George Marron although not solicitor on the record, but contemplated future counsel for the Applicants, and Mr. Malcolm A.F. Stockton represented Mr. Crowe.

Mr. Marron's argument was simply since he now was being retained by the Applicants, he had no time to prepare a case and would be ready at some future date convenient to all parties. It appeared, however, that no date could be set before March of 1989. Mr. Richard Kulis, on behalf of the Liquor Licence Board pointed out he was ready to proceed and had his witnesses present. Mr. Stockton, on behalf of Mr. Crowe, solicitor on the record, had no instructions to proceed. The question, therefore, arose as to whether or not there was sufficient justification for an adjournment.

Under Section 21 of the Statutory Powers Procedure Act, "a hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held." We are not satisfied that the Applicants could not be prepared to proceed despite the absence of their counsel and their ostensible intention to seek new counsel. We are of the view that the matter could have proceeded considering the notice given to the Applicants. The decision of the Liquor Licence Board was based on certain narcotics offences in which the Applicants were involved. The desire of the Board's counsel to proceed is, therefore, understandable.

It is to be noted that the decision of the Liquor Licence Board was that the hotel was to be closed and that it is now open after application was made to the Tribunal for a stay of that Order. It is also to be noted that the infractions involving the hotel were serious. The Tribunal takes the view that it has the jurisdiction to reverse the previous Order of the Tribunal and lift the stay if the Applicants are not prepared to proceed today. The reasons put forth by the Applicants are, in our view, not sufficient to persuade us an adjournment is justified.

Nevertheless, if the Applicants refuse to proceed today, the adjournment will be granted to be brought on on 15 days' clear notice and the Order of the Commercial Registration Appeal Tribunal dated the 19th day of September, 1988 which granted a Stay of the Order of the Liquor Licence Board of Ontario will be reversed. The Order of the Board is now in effect.

JAMES DAVID HALLWORTH
(FROSTY MUGGINS RESTAURANT)

HEARING TO CONSIDER A REQUEST FOR A STAY
OF A DECISION OF THE LIQUOR LICENCE BOARD OF ONTARIO

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, Presiding
J. BEVERLEY HOWSON, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

NORMAN JAMIESON, representing the Applicant

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 28 March 1989

Toronto

REASONS FOR RULING

The Tribunal has carefully considered the matters which have been raised by counsel for the Applicant, as well as by counsel for the Liquor Licence Board with respect to the Order which would revoke the licence of James David Hallworth, operating as Frosty Muggins Restaurant, effective April 3rd, 1989.

As was stated at the commencement of the hearing, we are not here today to consider the merits of Mr. Hallworth's appeal. That will be done by a panel of this Tribunal sitting in Kingston on April 26th and 27th. The sole issue before the Tribunal is that of whether a stay of the Liquor Licence Board's Order should be granted under Section 12(6) of the Liquor Licence Act, because that Order would otherwise revoke the licence for these premises with effect from April 3rd, 1989.

Mr. Kulis has referred to us the practice of the Liquor Licence Board with respect to the usual granting of a stay of such an Order pending an appeal, and pending the, in effect, hearing de novo of the matters in question before a panel of the Commercial Registration Appeal Tribunal. In this case, consent has not been given and, indeed, the Liquor Licence Board opposes the prosect of this business continuing in operation from the period of April 3rd until the actual hearing of the matter, some three and one-half weeks later on April 26th and 27th.

I would refer counsel to the decision of this Tribunal in the case of Johnathan's Place Limited and 612471 Ontario Limited which is referred to at page 255 in Volume 15 of the decisions of this Tribunal. The principles are set out there as to the kinds of matters the Tribunal should look at when considering a stay. These matters are such items as to whether the business is presently operating in a satisfactory condition, whether there are other current breaches or any health or safety concerns, the matter of the consequences of a revocation with respect to a loss of jobs, or a loss of value of the business or losses to creditors or matters with respect to whether the appeal is in effect bona fide, brought forward in good faith. And one might add to those items, a further one and that is, the matter as to when the hearing might in fact occur.

We have considered these various aspects and note that there was a substantial list of conditions that had been set out initially in the Decision that was made earlier and that resulted in a suspension for six weeks of the operations of this business. As counsel for the Liquor Licence Board explains, many of those conditions have not been met. Indeed, a number of the problems that had been referred to there and about which promises had been given to clear-up the difficulties have not been met. We are aware, of course, that there has been some embarrassment to the Liquor Licence Board in having the decision appear in the press with respect to this matter before it was received by Mr. Hallworth. However, considering the public interest as we see it, we believe that the public will certainly not at all be prejudiced by having this premises closed for the three and one-half weeks between April 3rd and the hearing de novo in Kingston on April 26th and 27th.

The Tribunal concludes that, accordingly, a stay should not be granted until the Tribunal makes a decision following that hearing. As a result, we accept the comments of counsel for the Liquor Licence Board in this particular case that the licence should be revoked effective April 3rd, 1989.

By virtue of the authority vested in it under Section 12(6) of the Liquor Licence Act, the Tribunal denies the application for a stay.

ORVILLE A. HASFAL

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

TO REFUSE TO GRANT THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
DR. STEPHEN G. TRIANTIS, Member
GEORGE J. CORMACK, Member

APPEARANCES:

ORVILLE A. HASFAL, appearing on his own behalf

JANE WEARY, representing the
Registrar of Real Estate and Business Brokers

DATE OF

HEARING: 11 January 1989

Toronto

REASONS FOR RULING

This is an application by Orville A. Hasfal for registration as a real estate salesman. At the time of this application, he apparently was employed by Montreal Trust, but this employment appears to have been terminated sometime around August 18th, 1988. The termination of this employment seems to be somewhat obscure in its terms, because Mr. Hasfal, even today, appears to be under the impression that he still has some association with this company.

It is a requirement of the Act that an applicant for registration be sponsored by a real estate broker, but the Applicant appears to have no sponsorship and no employment. At the time of this application, he had status to apply to the Registrar, but as of this date it would appear his status has been terminated.

The Real Estate and Business Brokers Act, Section 3(1)(b) provides that, "no person shall trade in real estate as a salesman, unless he is registered as a salesman of a registered broker", and Section 1(m) of the Act defines a salesman as "a person employed, appointed or authorized by a broker to trade in real estate." Now, Mr. Hasfal, as of this date does not qualify and cannot be included in the definition of a salesman. It would, therefore, appear that he cannot

apply and the Registrar cannot entertain his application until he is employed by a broker. His application is, therefore, premature. The Tribunal takes the position that without the necessary employment with a real estate firm, the Applicant is precluded from appealing to this Tribunal (Re: Ainsworth, CRAT decision released: May 11th, 1988). This is not a Tribunal of first instance, but an appellate Tribunal.

If the Registrar had been advised by the Montreal Trust, or whatever associated broker was involved, that the Applicant was no longer employed by that company, I should not have thought we would be here today. The Registrar would not have considered his application for registration. The broker was clearly at fault in failing to notify the Registrar of this termination pursuant to Section 21(1)(c) of the Act which provides, "Every broker shall, within five days after the event, notify the Registrar in writing of...any commencement or termination of employment, appointment or authorization of a salesman." I am sure the Applicant, Mr. Hasfal, now understands his position and why, under the circumstances, the application must be dismissed, without prejudice, of course, to him if he is employed by another broker, to make further application at that time.

It is unfortunate that a man goes through the real estate course but with no one with whom he can be considered to be associated cannot obtain a licence. But that is our view of the situation, subject to any remarks by either Mr. Hasfal or counsel for the Registrar. Our opinion is supported by Section 13(3) of the Regulations, which provides "a salesman may only be registered where he is the salesman of a registered broker."

Despite the precise language of the Section we do, however, find a curious anomaly arising between it and the definition of salesman and Section 3(b) of the Act. A salesman, according to the definition, is a person authorized by a broker to trade in real estate, but under Section 3(b), he cannot trade in real estate until he is registered. The Regulations, however, provide that he cannot be registered until he brings himself within the definition and that appears to authorize him to trade in real estate by authority of his broker. It seems to be a circle without beginning or end.

We should have thought that the Regulation could be more precise by the use of the word 'applicant' instead of 'salesman' in the first phrase and 'employee' instead of 'salesman' in the second phrase. That, however, is a matter

for the legislators to consider in the future and is not material to the issue before us today.

By virtue of the authority vested in it under Section 13(13) of Regulation 891 of the Real Estate and Business Brokers Act, the Tribunal finds it has no jurisdiction to hear this appeal and it will, therefore, be dismissed.

JOHN KUP and
ALLAN HUNTER (EATERS RESTAURANT)

HEARING TO CONSIDER A REQUEST FOR AN
EXTENSION OF TIME FOR GIVING NOTICE OF AN APPEAL

OF A DECISION OF THE LIQUOR LICENCE BOARD OF ONTARIO

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, Presiding
J. BEVERLEY HOWSON, Member
NEIL E. VOSBURGH, Member

APPEARANCES:

JOHN KUP, appearing on his own behalf

STEPHEN BERNOFISKY, representing Allan Hunter

RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF

HEARING: 10 March 1989

Toronto

REASONS FOR RULING

The Tribunal has deliberated after having listened to the argument of Mr. Kup and counsel for Mr. Hunter and counsel for the Liquor Licence Board. It has particularly noted the provisions of Section 10(7) of the Ministry of Consumer and Commercial Relations Act which provides that:

Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are prima facie grounds for granting relief [which is the first condition] and that there are reasonable grounds for applying for the extension [which is the second condition], the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent upon such extension.

The Tribunal finds that there is a burden on the Applicant, Mr. Kup to satisfy the Tribunal with respect to this double onus.

The first question is that of prima facie facts or grounds for granting relief. Mr. Kup has alluded to certain matters with respect to title to the property, but no substantial evidence has been put forward as to what that evidence might be or what the title problem might be, and whether it is of any significance in the hearings which were conducted by the Liquor Licence Board. He has also indicated that the wishes of the municipality or the residents of the municipality have not been considered. Again this Tribunal finds that the wishes of the community were considered both in May and in September, 1987. Mr. Kup raised as well, that counsel for the Liquor Licence Board argued against the granting of a licence in the hearing in September and this fact, of course, was also dealt with by the Liquor Licence Board in its decision on October 6th, 1987.

For the information of Mr. Kup, this is a procedural matter which occurs. The earlier decision not to grant a licence was reviewed in the October public hearing, and it was incumbent on counsel for the Liquor Licence Board to put counter proposals to the Board to those being espoused by the Applicant, Mr. Hunter. It was up to the Board at that time to carefully assess what was the evidence before it, its observation of Mr. Hunter whom the Board found to be a creditable witness at that time and the other submissions of residents in the community.

On the basis of all of those matters, the Board at that time granted a licence to Mr. Hunter. No substantial evidence has been placed before this Tribunal that there were facts not presented to the Board that would substantially bring in issue the question of the granting of the licence. Nor have there been facts indicated to this Tribunal that show additional evidence, which was not available in October, is available now, and is substantial with respect to the issuance of the licence to Mr. Hunter's establishment.

The position of the Tribunal then is that this onus has not been satisfied by Mr. Kup. If it had, however, there is the second onus and that is the question of the delay in bringing the application for leave to appeal. In Mr. Kup's submissions and in the documentation filed before the Tribunal, it was acknowledged by Mr. Kup that he knew there was a 15 day limitation period as set out in his correspondence with the then Chairman of the Liquor Licence Board in November, 1987. He clearly indicated in his letter of November 5th, I believe in the last paragraph, that he required a speedy reply so that he could consider his options and, in fact, specifically made reference to the fact of an appeal to the Tribunal.

Mr. Drinkwalter at that time replied, on the 10th of November, and while that may have been out-of-time, it would have been within reason to ask leave of this Tribunal to permit an appeal after that time. But in fact, Mr. Kup did not bring an application, nor did he communicate with this Tribunal until January 5th, 1988. Even then, it would have been reasonable to have brought an application to this Tribunal for leave to appeal. Mr. Kup was informed of the fact in February of 1988, that the Liquor Licence Board would not consent to an appeal being brought before the Tribunal and this should have alerted Mr. Kup to the fact that he would have to bring an application promptly without the consent of the Board. Subsequently, no action was taken until late in 1988 during which time, Mr. Hunter had been granted a licence on June 13th, 1988, and had conducted a full season's operation of the restaurant during 1988.

Mr. Kup indicated to the Tribunal that the reason for this delay was that he was pursuing the political route through his local member of the Provincial Legislature, Mr. John Eakins. And while that is an option open to any citizen of this Province, in fact what the taking of that route indicates, is that it precludes then coming to this Tribunal and saying I now wish to go back to where I was more than a year ago. Mr. Kup has elected not to follow the procedures as set out under the Ministry of Consumer and Commercial Relations Act.

Under the circumstances, therefore, this Tribunal finds that the two onuses which the Applicant, Mr. Kup must satisfy have not been so satisfied. Therefore, the Tribunal denies the application for leave to appeal the decision of the Liquor Licence Board which was granted October 22nd, 1987.

LAKESHORE PUBS LIMITED
(KELLY'S KEG'N JESTER TAVERN)

APPEAL FROM A DECISION OF THE
LIQUOR LICENCE BOARD OF ONTARIO

TO REVOKE THE LICENCES AND
TO REFUSE TO RENEW THE LICENCES

TRIBUNAL: RICHARD F. STEPHENSON, Vice-Chairman, presiding
GORDON R. DRYDEN, Member
ROBERT COWAN, Member

APPEARANCES:
EDWARD A JUPP, Q.C., Applicant
RICHARD E. KULIS, representing the Liquor Licence Board

DATE OF
HEARING: 12 May 1989 Toronto

REASONS FOR RULING

The Tribunal has deliberated and reviewed the submissions that have been made by counsel, recognizing Mr. Jupp that you are not appearing as counsel as such but as an Applicant, and the Tribunal finds as a fact that Lakeshore Pubs Limited has had a lengthy history of a lease in the premises at Ontario Place known as Kelly's Keg and Jester Tavern. It also finds as a fact that the lease from Ontario Place Corporation to Lakeshore Pubs Limited expired on October 31st, 1988 and that Ontario Place did not renew the lease at that time.

Evidence has been presented to the Tribunal that an action has been commenced in the Supreme Court of Ontario by Lakeshore Pubs Limited against its former landlord, Ontario Place for a declaration of a continuing or of a new lease, for damages in the amount of \$1.8 million dollars and for injunctive relief and that this action may, in fact, be in the alternative rather than all combined.

The Tribunal also finds that looking upon this point of time, May 12th, 1989 that no decision has yet been given by the Supreme Court of Ontario with respect to that application and that the Tribunal must make its decision on the basis of the facts in existence today. The Tribunal notes that this is an application

with respect to a renewal of a liquor licence and the revocation thereof and that it is dealing with two parties only, the Liquor Licence Board of Ontario and Lakeshore Pubs Limited. It is not dealing with a situation that arises in the lawsuit in another form and, therefore, in accepting its responsibility, this Tribunal has to deal with the decision made by the Liquor Licence Board as it pertains to Lakeshore Pubs Limited.

It finds that at this point in time, Ontario Place is a party capable of contracting with other parties and evidence has been presented to this Tribunal that in fact, the lease to Lakeshore Pubs Limited, the premises, I believe described as 822 at Ontario Place has terminated and that a new lease has been entered into with another party.

Looking at those facts, this Tribunal recognizes that a licence can only be granted for physical premises that are owned by an applicant or held under a lease. Until such time as the Supreme Court of Ontario makes a determination that Lakeshore Pubs Limited holds a lease, this Tribunal must go upon the facts that were before it and before the Liquor Licence Board, namely that Lakeshore Pubs Limited does not hold a valid lease to premises at Ontario Place. When the Tribunal says valid lease, it is not making a judgment on the nature of that lease because that is a matter that may be decided by the Supreme Court of Ontario.

If the Applicant is successful in its application before the Supreme Court of Ontario, then the Liquor Licence Board will have to deal with the issue as it affects Lakeshore Pubs Limited at that time.

Mr. Jupp in his presentation to the Tribunal requested the Tribunal to grant a stay of the decision of the Liquor Licence Board on the basis that the status quo should be maintained until the hearing on May 29th of this Tribunal. The Tribunal finds that to maintain the status quo the Tribunal must accept the fact that there is no lease in favour of Lakeshore Pubs Limited and on that basis, to grant a stay would in fact be to change the status quo because there are no premises presently occupied by Lakeshore Pubs Limited.

On the basis of the admissions and the facts presented and the argument, upon hearing the submissions made on behalf of Lakeshore Pubs Limited, the Licensee of Kelly's Keg and Jester Tavern requesting a stay of the order, by virtue of the authority vested in it under Section 12(6) of the Liquor Licence Act, the Tribunal hereby denies the application.

JAMES AND PAMELA MOIR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
TIBOR PHILIP GREGOR, Member
LOUIS A. RICE, Member

APPEARANCES: REX BISHOP, representing the Applicant

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 20 November 1989

Toronto

RULING

Having heard the representations of the parties and having seized itself of the matter, the Tribunal rules as follows on the motion made by Mr. Milroy on behalf of the builder for the postponement of the hearing.

The basis of Mr. Milroy's motion is that he was only apprised of the hearing late last week and has not been able to discuss the matter with his counsel or refer to his records. Mr. Milroy states that his evidence will be important in resolving the issues before the Tribunal. The Tribunal finds that it is necessary to grant Mr. Milroy's motion, in order to permit a full and fair hearing.

The Tribunal notes in passing, that counsel for the New Home Warranty Program was only given the file for this hearing ten days to two weeks ago, although notice of the hearing was sent to the New Home Warranty Program two months ago. It would be advisable for counsel to receive the file at an earlier date in order to allow her the time to study it and take any necessary procedures before the hearing date. Counsel stated that she intended to implead the builder but was unable to do so because she did not receive the file in time.

The Tribunal therefor fixes peremptorily the hearing of this case for Friday, December 15th, 1989 at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto at 9:30 a.m.

MR. PLEASURE POOLS LTD.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF THE CONSUMER PROTECTION BUREAU

TO REVOKE THE REGISTRATION

TRIBUNAL:

JAMES R. BREITHAUPT, Q.C., Chairman, presiding
HELEN J. MORNINGSTAR, Member
DALE PAPKE, Member

APPEARANCES:

JANE WEARY, representing the Registrar of the
Consumer Protection Bureau

No one appearing for the Applicant

ADJOURNMENT AND ORDER

The Proposal by the Registrar to revoke registration regarding Mr. Pleasure Pool Ltd. is dated January 10th, 1989. On January 20th, Mr. Michael F. Stoyka, Q.C., wrote to the Tribunal requesting a hearing on behalf of the registrant and stated:

As the nature of my practise is strictly related to a litigation or courtroom setting, it is important that any hearing date be scheduled with my concurrence in order to ensure that there is no conflict with my trial schedule.

On July 21st, the Registrar of this Tribunal wrote the usual administrative letter to both the Registrar of the Consumer Protection Bureau and Mr. Stoyka. That registered letter announced the proposed hearing date as October 24th. No response was received; the formal Notice was sent on October 3rd; the panel was struck for this hearing; and here we all are.

A copy of a letter directed to counsel at the Ministry of Consumer and Commercial Relations was received by FAX yesterday at 4:24 p.m. from Mr. Stoyka stating that he is apparently committed to a trial this morning in Leamington. He notes:

I do confirm that the hearing date which was apparently scheduled for the 24th of

October 1989 was done so without consultation with myself or perhaps yourself as well.

The three month notice which was sent to Mr. Stoyka was evidently not enough for him. This Tribunal attempts to deal with hearings under our variety of statutes in an expeditious manner and to bring them forward with adequate notice, within three or four months of a perfected request.

We expect to be treated with the same courtesy as any other body in Ontario that hears and resolves disputes. The failure to proceed this morning is entirely the responsibility of Mr. Stoyka. He has graciously given us a variety of dates up to Christmas eve when he could find the time to be with us.

While Mr. Stoyka's letter stated that someone would attend at the hearing this morning to seek an adjournment, that person has not arrived even though we had delayed the commencement of this hearing from 9:30 to 10:00 a.m. as a further courtesy.

With the agreement of counsel for the Registrar and having the list of dates set out by Mr. Stoyka in his letter to her, the Tribunal adjourns this hearing peremptorily to Thursday, December 14th, 1989 at 9:30 a.m. at the Tribunal offices, 1 St. Clair Avenue West, Toronto, Ontario.

ROBERT BRUCE NIMMO

HEARING TO CONSIDER AN OBJECTION TO THE
LIFTING OF A STAY PENDING THE DISPOSITION OF AN APPEAL
OF A DECISION AND ORDER OF THE TRIBUNAL
TO THE SUPREME COURT OF ONTARIO

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
MICHAEL E. LERANBAUM, Member
MAURICE LAMOND, Member

APPEARANCES:
NATALIE BRONSTEIN, representing the Applicant

GAIL MIDANIK, representing the
Registrar of Real Estate and Business Brokers

DATE OF
HEARING: 29 August 1989 Toronto

REASONS FOR RULING

The Applicant, Robert Bruce Nimmo, applied for registration as a salesman under the Real Estate and Business Brokers Act by application filed on October 3rd, 1988.

After due consideration and several meetings with Mr. Nimmo, the Registrar concluded that the application should be denied and pursuant to Section 8 of the Act issued a Proposal dated the 31st day of October, 1988 refusing to grant registration.

Nimmo then appealed to the Commercial Registration Appeal Tribunal which heard the appeal on the 26th of January and the 17th March, 1989. After hearing the considerable evidence adduced on behalf of both Applicant and respondent, the Tribunal allowed the appeal and granted registration subject to the following terms and conditions:

1. For the period of registration, Nimmo's registration shall be with Gibson Realty under the supervision and monitoring of Mr. John Gibson and such registration shall continue during the period unless changed with the consent of the broker and acceptance of the Registrar; any

substituted broker during this period shall agree with the Registrar as to the obligations imposed herein.

2. The broker, Gibson Realty, shall supervise all real estate activities of Nimmo, including approving his advertising, listing agreements and sales agreements and contacting all purchasers and vendors for whom Nimmo arranges a completed agreement.
3. The broker shall report each month to the Registrar on the comportment and behaviour of Mr. Nimmo and stating that Mr. Nimmo is fully satisfying the Real Estate and Business Brokers Act. These monthly reports will begin on September 30th, 1989 and conclude on February 28th, 1990.
4. Thereafter, the broker shall submit a report every three months until the expiration of Mr. Nimmo's registration period.

A further proviso in the Decision of the Commercial Registration Appeal Tribunal was to the effect that Nimmo's registration would not come into effect until September 1st, 1989.

The Registrar, however, has been disposed to appeal this decision and issued a Notice of Appeal to the Supreme Court of Ontario (Divisional Court) (Exhibit 4) asking that the Decision and Order of the Tribunal be set aside, and for an Order directing the Registrar to carry out his Proposal to refuse registration of the respondent.

The grounds for appeal are as follows:

1. The Tribunal erred in law and fact in failing to direct the Registrar to carry out his proposal to refuse to grant registration.

2. The Tribunal erred in law and fact in failing to apply the legislative test that the past conduct of the respondent afforded reasonable grounds for belief that the respondent would not carry on business in accordance with law, integrity and honesty.
3. The Tribunal acted contrary to the evidence and weight of the evidence and did not consider relevant evidence.

The appeal has not been heard, the Notice of Appeal only being issued on June 5th last and it, therefore, may be many months before it comes before the Court.

Although the Commercial Registration Appeal Tribunal had ordered the registration of the Applicant in its decision of May 24th, 1989, the effect of the Registrar's appeal is to impose an automatic stay of that Order pursuant to Section 25 of the Statutory Powers Procedure Act. A further result of the Registrar's appeal is that it maintains the status quo - the matter assuming its original standing until the appeal to the Divisional Court is heard. Nimmo was not a registered real estate salesman and will not be until either the appeal is adjudicated or the stay is lifted. In our view, the intention of the legislation is to preserve the status until disposition of the appeal.

As a result, Mr. Nimmo has come to this Tribunal for an Order lifting the automatic stay of the Tribunal's Order until the appeal is heard.

Counsel for both parties have conceded that in any application for a stay the principles laid down by the Court in Re: Great Northern Capital Corporation Ltd. et al and City of Toronto et al, (1973) 1 O.R.(2d) at p.160 are the factors by which we should be guided. Counsel for the Applicant submits these same factors should apply to lifting a stay. These are as follows:

The factors to be considered on application for stay are the bona fides of the appeal; the substance of the grounds for appeal and the hardship to the respective parties if such a stay were granted or refused.

We are of the view, however, that these issues are irrelevant to our decision, the only question to be decided being that of jurisdiction. Does this Tribunal have the jurisdiction to lift a stay as requested by the Applicant or is it functus as argued by counsel for the respondent?

The authority for this Tribunal is found in the Ministry of Consumer and Commercial Relations Act, the Act under which the application is taken - the Real Estate and Business Brokers Act, and the Statutory Powers Procedure Act. The Registrar has appealed to the Divisional Court pursuant to Section 11 of the Ministry of Consumer and Commercial Relations Act, and the Order of the Tribunal has been stayed pursuant to Section 25 of the Statutory Powers Procedure Act which provides:

25.(1) Unless it is expressly provided to the contrary in the Act under which the proceedings arise, an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

To find authority for this Tribunal to grant the order, we therefore must turn to the Real Estate and Business Brokers Act for an express provision contrary to that contemplated by Section 25 of the Statutory Powers Procedure Act. The only relevant section of the Real Estate and Business Brokers Act is Section 9 (9) which provides:

9(9) Notwithstanding that a registrant appeals from an order of the tribunal under section 11 of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately, but the tribunal may grant a stay until disposition of the appeal.

It is clear from the text that the section deals only with an appeal by a registrant and not the Registrar. For one to conclude otherwise, one would have to find in the section, provision for an appeal by the Registrar. There is none. It is,

therefore, our opinion that there is no intention contrary to Section 25 of the Statutory Powers Procedure Act to be found in the Real Estate and Business Brokers Act, except where the registrant is the appellant.

Turning now to Section 25 of the Statutory Powers Procedure Act, we note that the provision for an appeal to lift a stay is as follows:

...an appeal from a decision of a tribunal to a court or other appellate tribunal operates as a stay in the matter except where the tribunal or the court or other body to which the appeal is taken otherwise orders.

In our view, the Legislature has provided explicit legislation giving the exclusive jurisdiction to the appellate court to decide whether or not the stay should be lifted in the absence of a contrary intention in the relevant Act. Conversely, we cannot find any authority to lift the stay since it is provided for in neither the Real Estate and Business Brokers Act nor the Statutory Powers Procedure Act. The Applicant, therefore, must seek his remedy in the Court to which the Registrar has appealed since this Tribunal has no jurisdiction over the matter. This appeal is consequently denied.

141603 CANADA LIMITED
(UNITRAVEL SERVICES)

APPEAL FROM A PROPOSAL OF
THE REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TO REFUSE TO RENEW THE REGISTRATION
AND FOR TEMPORARY SUSPENSION

TRIBUNAL:

DAVID APPEL, Vice-Chairman, Presiding
GORDON R. DRYDEN, Member
KEITH COPPARD, Member

APPEARANCES:

MARK LAZAROVITZ, representing the Applicant

JANE WEARY, representing the Registrar under the
Travel Industry Act

DATE OF

HEARING: 14 September 1989

Toronto

ORDER

In view of the settlement reached by the parties, the Tribunal renders judgment as follows:

1. The registrant shall deposit with their attorney, Mark Lazarovitz, in trust, the sum of \$5,000, the proceeds of which are to be used to pay the outstanding debt owing to Tours Mont-Royal Inc. Any excess will be refunded to the Registrant.
2. Upon receipt by the Registrar of notice from Mr. Lazarovitz that the said sum of \$5,000 has been deposited to his trust account or that Tour Mont-Royal Inc. has been paid in full, the Registrar shall withdraw his Notice of Proposal to temporarily suspend registration.
3. Failure to follow through with the above agreement within fifteen days shall entitle the Registrar to continue with the suspension of registration of the Registrant.

MR. AND MRS. G. WILEY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES R. BREITHAUP, Q.C., Chairman, presiding
J. BEVERLEY HOWSON, Member
LOUIS A. RICE, Member

APPEARANCES;

ROBERT J. BANIK, representing the Applicant

CAROL A. STREET, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 November 1989

Toronto

ORDER

In July 1987, Gerald and Brenda Wiley purchased a newly built house at Bobcaygeon, Ontario from Orpa Holdings Limited which had been built by R. Moore Construction Ltd. The closing of the transaction occurred on September 3rd, 1987 and severe water damage occurred by leaks through the basement walls on March 9th, 1988. Mr. and Mrs. Wiley had begun a claim under the Ontario New Home Warranties Plan by a letter of April 3rd, 1988 and sought to have their home raised several feet to alleviate the major problems which they have; and also to have other particular defects corrected.

After an inspection on October 17th, 1988 a Conciliation Report was prepared to observe on sixteen complaints under Schedule A(1) warranty and nine complaints under Schedule A(2) non-warranty. Re-inspection took place on April 27th, 1988 with complaints of eight items in Schedule A(1) and eleven items in Schedule A(2) being considered.

The major issue was that of the installation of the septic tank system and the New Home Warranty Program rejected the claim for replacement and stated that installation was done in accordance with the prescribed standards, so no warrantable defect had occurred. Mr. and Mrs. Wiley are appealing that decision to this Tribunal.

The sole matter for this panel to decide upon today is whether or not to grant the request for a stay of the hearing pending disposition of the actions in this matter presently before the Supreme Court of Ontario.

Counsel for the New Home Warranty Program reminded the Tribunal of the provisions of Section 21 and 23(1) of the Statutory Powers Procedure Act, R.S.O. 1980, Chapter 484, which are:

21. A hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held.

23. (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

.....

Counsel suggested that since this Tribunal would be bound by a decision of the Supreme Court of Ontario, the resolution of the two actions begun against Orpa Holdings Limited and R. Moore Construction Ltd. (10175/88) and against the Corporation of the Township of Harvey (10176/88) would resolve the outstanding issues between the parties.

However, since the Supreme Court of Ontario is not bound by any decision made on the merits by this Tribunal, conflicting and inconsistent decisions could occur if this Tribunal was to proceed and make some Order which may likely be appealed to the Divisional Court of the Supreme Court of Ontario while that Court was proceeding to deal with the two actions which could be resolved with some contrary decisions.

A review of the contents of the claim in each action shows that the issues to be considered there are the same matters which would come before this Tribunal at a hearing.

On two recent hearings before panels of this Tribunal, the same question which is before us today was resolved in favour of the granting of a stay.

In the claim of Reginald Heasman heard on August 25th, 1987 and reported in Volume 16, CRAT (1987) at p.289, the Tribunal noted:

.....
 However, in the present case, the Tribunal perceives a direct conflict of jurisdiction between that of the Supreme Court of Ontario and that of the Commercial Registration Appeal Tribunal. In such a case, we are persuaded by precedent and otherwise that we really cannot proceed until the Supreme Court has ruled.

This view was based on the authorities cited there which are accepted by this panel; being Huebner vs. Direct Digital Industries Ltd. et al (1975) 11 O.R. (2d) 372, and Carleton Condominium Corporation No. 111, Volume 13 CRAT (1984) p.201, and Peel Condominium Corporation No. 146, Volume 9 CRAT (1980) p.69.

In the claim of Mr. and Mrs. Ahmed reported in Volume 17, CRAT (1988) at p.271, the precedent of the Reginald Heasman decision was followed by the Tribunal, which stated:

We have taken the view that in the light of the action in the District Court, it would be premature for this Tribunal to proceed because the claim is fairly comprehensive and all the evidence is not available to us that would be available to the District Court. We take the view also that it is desirable, if not imperative, to avoid multiple proceedings thereby leading, to perhaps, inconsistent decisions by different forums.

Accordingly, this Tribunal orders that this claim be adjourned sine die pending the decisions in the two actions begun by the Applicants in the Supreme Court of Ontario

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Commercial Registration Appeal Tribunal



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Supreme Court of Ontario
Decisions and Orders

Volume 19 (1971 - 1989)



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUPREME COURT OF ONTARIO DECISIONS AND ORDERS* - VOLUME 19

CITED 1989 19 C.R.A.T.

- * This volume contains decisions and orders of the Supreme Court of Ontario for the years 1971 to 1989 inclusive.



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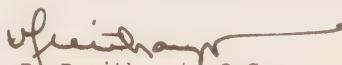
From 1971 to 1989, the Liquor Licence Appeal Tribunal and the Commercial Registration Appeal Tribunal have made decisions in some 1,200 matters, as reported in seven and eighteen volumes respectively. While reference is made to the fact that a decision is being appealed, nowhere have all the results of those appeals been gathered.

In this volume, to be cited as "CRAT (1989) Volume 19", all appeal orders and decisions of the Supreme Court of Ontario concerning both this and the prior Tribunals are reproduced. One hundred and eleven matters were seen through the launching of an appeal to a final order or decision by the Divisional Court.

In only 14 cases, was the decision of the Tribunal overruled or a matter sent back for a rehearing. This rate of just 1 per cent of the cases initially heard confirms for the members of the Tribunal the serious and thorough hearing procedure which we attempt to follow and the quality of the results which are decided.

We believe that our record can give confidence to the people of Ontario that this Tribunal is completing our work in a sound, courteous and efficient manner.

In future years, the Supreme Court orders and decisions of a current year will be included in the CRAT volume for that year.


James R. Breithaupt, Q.C.
Chairman

COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUPREME COURT OF ONTARIO DECISIONS AND ORDERS

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IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

MORAND, CROMARTY and CARRUTHERS, JJ.

IN THE MATTER OF The Business)	
Practices Act, 1974, S.O.1974,)	
c. 131;)	
	)	<u>W.R. Herridge, Q.C.,</u>
AND IN THE MATTER OF William	)	for the applicants, appellants
G. Pollock Studio of Dancing)	
Limited operating as William G.)	)	<u>T.H. Wickett, Q.C.,</u>
Pollock Dance Club and William	)	for the respondent, respondent
G. Pollock)	
)	
Applicants,)	
(Appellants))	
- and -)	
)	
Director of the Business)	
Practices Act, 1974)	
)	
Respondent)	
(Respondent)	)	<u>Heard: October 4, 1978.</u>

CARRUTHERS, J. (Orally):-

This is an appeal from the decision and order of the Commercial Registration Appeal Tribunal dated May 2, 1977. The applicants ask that that decision be reversed and the order set aside or, in the alternative, varied.

From the position taken by counsel for the applicants in argument today, it appears that the applicants do not take any issue with the first paragraph of the order under appeal, it being the position of counsel for the applicants that what is provided for by that paragraph is within the power of the tribunal as provided for in The Business Practices Act, 1974, S.O.1974, c.131. There is no issue with respect to facts or findings of fact.

We are then left with a consideration of whether paras. 2 through to 5 inclusive of the order appealed from are within the competence of the tribunal. It is the position of the applicants that they are not, and that in providing as it has, the tribunal has exceeded its power inasmuch the effect of each of those paragraphs is a mandatory provision which is not authorized by the

Act, by which the tribunal is governed, and which entrench upon the provisions of s.96 of the British North America Act. On either ground then, the tribunal is without jurisdiction according to the applicant.

Paragraph 6 of the order under the appeal, according to counsel for the applicant, constitutes an absolute entrenchment upon the provisions of 2.96 of the British North America Act. In my opinion, that paragraph in the order cannot stand. It is clear that it does transcend the jurisdiction of the tribunal and, in saying this, I am also governed by the fact that the paragraph purports, on the basis of the facts given to us by counsel for the applicant, to affect the rights of individuals who are not before the tribunal and who are not involved in these proceedings.

In my opinion, paras. 2 through to 5 inclusive can remain in the tribunal's order inasmuch as, it is my opinion, that they provide for matters ancillary to the powers that are given to the tribunal under the Act. I refer and rely upon Tomko v. The Nova Scotia Labour Relations Board, [1977] 1 S.C.R.112 to which we were referred at length by counsel.

In the result then, the application will be allowed insofar as it relates to para. 6 of the order, and otherwise, the application shall be dismissed. There will be no order as to costs.

Released: October 30, 1978.

THE SUPREME COURT OF ONTARIO

B E T W E E N:

THE REGISTRAR OF COLLECTION
AGENCIES, under the Collection
Agencies Act,

Appellant,

- and -

JAMES EDWARD ACKER,

Respondent.

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under rule 61.12 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

Dated July 16, 1986.

A. P. Bridges,
Registrar of the
Divisional Court

IN THE SUPREME COURT OF ONTARIO

(DIVISIONAL COURT)

DONNELLY, THOMPSON and HOLLAND, JJ

IN THE MATTER OF THE CONSUMER)
 PROTECTION ACT, S.A. 1966 AS)
 AMENDED BY 1967 CHAPTER 13, AND)
 1968 CHAPTER 17 and 1968-69 AS)
 AMENDED, AND THE REGULATIONS)
 THEREUNDER:)

AND IN THE MATTER OF THE CONSUMER) P.T. Matlow,
 PROTECTION ACT, R.S.O. 1970,) for the Appellant.
 CHAPTER 82 AS AMENDED, AND THE)
 REGULATIONS THEREUNDER) J. Polika,
) for Respondent.

AND IN THE MATTER OF ERNEST)
 GOETZ ENTERPRISES LIMITED,)
 TRADING AS BROTHER SEWING CENTRES)

-and- Appellant,

Heard: 11th June, 1973.

REGISTRAR OF CONSUMER PROTECTION)
 BUREAU,)

Respondent.)

DONNELLY, J.: (Orally)

The appellant seeks an order staying the order of the Commercial Registration Appeal Tribunal dated the 26th of April, 1973 until the disposition of the appellant's appeal. The hearing before the Tribunal extended over several months. On the 26th of April an order was made revoking the registration of the appellant as an itinerant seller. The Tribunal stayed the Order for eighteen days which expired on the 13th May. On the 8th May the appellant engaged counsel presently before the Court on his behalf. He caused a notice of appeal to be served on May 11th. The disposition of the appeal is held up pending receipt of the transcript of the proceedings before the Tribunal. On the 28th of May counsel for the appellant applied to the Tribunal for an order staying the order made on April 26th. On May 29th he was advised by the Registrar that the Tribunal considered it was functus in the matter having already granted a stay and having deposited the

record in the Divisional Court Office on the appeal, that there was no way in which the matter could be brought before the Tribunal. Section 7(9) of The Consumer Protection Act Provides:

"Notwithstanding that a registrant appeals from an order of the Tribunal...the order takes effect immediately by the Tribunal may grant a stay until disposition of the appeal".

We are of the opinion that the proper body to consider the application for a stay is the Tribunal. The fact that it earlier granted a stay of eighteen days and forwarded the record to the Divisional Court Office does not deprive it of jurisdiction. The Act authorizes it to grant a stay until the disposition of the appeal. When the application for a stay of the order was made on May 28th, 1973 the Tribunal was required to hear it. The matter is referred back to the Tribunal for disposition.

In view of urgency of the matter the hearing is to be held as soon as possible.

IN THE SUPREME COURT OF ONTARIO

THE HONOURABLE MR.)	
JUSTICE DONNELLY.)	
	)	MONDAY, THE 11TH DAY OF
THE HONOURABLE MR.)	
JUSTICE THOMPSON.	)	JUNE, A.D. 1973.
)	
THE HONOURABLE MR.)	
JUSTICE HOLLAND.)	

IN THE MATTER OF THE CONSUMER PROTECTION ACT, S.O. 1966 AS AMENDED BY 1967 CHAPTER 13, AND 1968 CHAPTER 17, and 1968-69 AS AMENDED, AND THE REGULATIONS THEREUNDER:

AND IN THE MATTER OF THE CONSUMER PROTECTION ACT, R.S.O. 1970, CHAPTER 82 AS AMENDED, AND THE REGULATIONS THEREUNDER.

AND IN THE MATTER OF ERNEST GOETZ ENTERPRISES LIMITED, TRADING AS BROTHER SEWING CENTRES,

Appellant,

-and-

REGISTRAR OF CONSUMER PROTECTION BUREAU,

Respondent

O R D E R

Upon the application made on behalf of the appellant for an Order staying the Order made by the Commercial Registration Appeal Tribunal on the 26th day of April, 1973, pending the disposition of this appeal, upon hearing read the Affidavit of Ernest Goetz, filed, the Notice of Appeal and Supplementary Notice of Appeal, and upon hearing counsel for both parties:

1. THIS COURT DOTH ORDER that this application be and the same is hereby referred to the Commercial Registration Appeal Tribunal.

2. THIS COURT DOTH FURTHER ORDER that the hearing of this application before the Commercial Registration Appeal Tribunal be held as soon as possible.

3. AND THIS COURT DOTH FURTHER ORDER that there be no order with respect to the costs of this application.

THE LIQUOR LICENCE ACT OF ONTARIO, 1975

IN THE MATTER OF DOMENICO BARLETTA, LICENSEE
OF THE BEFF BARON TAVERN, SITUATE AT 624 YORK STREET
IN THE CITY OF LONDON, PROVINCE OF ONTARIO
- LICENCE NUMBER 091726

AND IN THE MATTER OF THE 'ORDER' OF THE
LIQUOR LICENCE BOARD OF ONTARIO DATED MAY 17, 1979

The Divisional Court, after a hearing into the Order of the Liquor Licence Board attaching a 'Term and Condition' to the Dining Lounge licence of Domenico Barletta, issued in respect of the Beef Baron Tavern, London, has, on the 6th of April, 1981, CONFIRMED the aforementioned Order and also a similar Order of the Liquor Licence Appeal Tribunal bearing the date September 27th, 1979; therefore, the Board hereby ORDERS that a Term and Condition be attached to the Dining Lounge licence of the Beef Baron Tavern whereby the sale and service of alcoholic beverages in these premises shall CEASE at 10:00 p.m. daily commencing MONDAY, APRIL 27TH, 1981 and continuing in effect until such time as the requirements of Section 6, subsection (5)(a) of Regulation 1008/75 are satisfied.

DATED AT TORONTO this 23rd day of April, 1981.

IN THE SUPREME COURT OF ONTARIO
(Divisional Court)

B E T W E E N :

DOMENICO BARLETTA,

Applicant

- and -

THE LIQUOR LICENCE BOARD OF ONTARIO

Respondent

MINUTES OF SETTLEMENT

The parties hereto by their solicitors and the applicant personally agree to resolve the various issues that exist between them on the following basis:

1. The Applicant wholly discontinues and agrees to the dismissal of his appeal to the Supreme Court of Ontario (Divisional Court) from the revocation of his licence (Dining Lounge) by the Liquor Board.

2. The Respondent agrees that the Applicant may until November 1, 1982 continue to offer for sale and service alcoholic beverages at his premises at 624 York Street, London, Ontario in accordance with the Liquor Licence Act and the existing term and condition on his licence.

3. The Applicant and the Respondent agree that the Applicant shall receive from the Respondent an Entertainment Lounge Licence upon the applicant modifying and enlarging his premises so as to conform to the Regulations made pursuant to the Liquor Licence Act. The parties hereto agree that in any event the applicant is not to receive an Entertainment Lounge Licence before February 28, 1983.

4. The application of Judicial Review and an order by way of mandamus to compel the Liquor Licence Board to render its decision with respect to the Applicant's application for an Entertainment Lounge Licence shall be dismissed.

CHAPPELL, BUSHELL & STEWART
Solicitors for the Applicant

DOMENICO BARLETTA

A. RENDALL DICK, Q.C.
Solicitor for the Liquor
Licence Board of Ontario

MINISTRY OF THE ATTORNEY GENERAL
CROWN LAW OFFICE
CIVIL LAW

Refer to File: 64433

September 11 1980

MEMORANDUM TO;

Mrs. A. Verge
Min. of Consumer & Comm. Rel.
1 St Clair Ave., West

RE: BORDEAUX RESTAURANTS

It would appear that there were no written reasons delivered in the matter of this appeal however, my file reveals that I wrote to the Chairman of the Liquor Licence Board on or about the 18th of March, 1980 and advised him that it was made clear by the court that the guidelines which the Appeal Tribunal adopts with respect to the application of Sec. 6(5) of the Regulation, can only be applied with respect to the penalty that may be assessed. That is, the question of whether a licensee did or did not meet the food/liquor ratio must be answered solely on the basis of the facts put before the Board as reviewed by the records of the licensee. In other words, there were two questions that must be dealt with by the Tribunal, firstly, the question of whether the ratio was met and secondly, if not, the penalty be assessed having regard to same.

If I can provide you with any further information, kindly advise.

Dennis W. Brown, Q.C.
Counsel

MINISTRY OF THE ATTORNEY GENERAL
CROWN LAW OFFICE
CIVIL LAW

Refer to File: 64433

March 18, 1980

MEMORANDUM TO:

Mr. E. B. Rice
Chairman
The Liquor Licence Board of Ontario
55 Lakeshore Blvd., E.
Toronto

RE: BORDEAUX RESTAURANTS LTD

I would advise that on Tuesday, the 11th of March, 1980, the Divisional Court dismissed the application of Bordeaux Restaurants Ltd., for an Order quashing the decision of the Liquor Licence Appeal Tribunal.

Accordingly, the hours of operation will be those as originally fixed by the Board at the time of its decision together with the condition that adequate bookkeeping procedures be instituted.

I might point out that the Court did indicate that the guidelines which the Tribunal has been using with respect to Sec. 6(5) of the Regulation are within their power but only with respect to determining the penalty to be assessed. That is, the sole question is whether you did, or did not meet the food/liquor ratio and not whether you intended to sometime in the future. As a result, there would not appear to be any room for discretion subject to that which might be exercised in determining the hours which might best allow for the licensee to meet the requirements of 6(5).

If you require any further information, kindly advise at your convenience.

Dennis W. Brown, Q.C.
Counsel

For the information of
Mr. J. Yaremko, Q.C.

Office of the
Chairman

Liquor Licence
Board
of Ontario

55 Lake Shore Blvd East
Toronto, Canada
M5E 1A4

THE LIQUOR LICENCE ACT, 1975

IN THE MATTER OF MESSRS. JOSEPH AND IVAN CVETKOVIC,
LICENCEES OF CECIL TAVERN, SITUATE AT 113 JAMES STREET NORTH,
HAMILTON, ONTARIO - LICENCE NUMBER 091186

AND IN THE MATTER OF THE "ORDER" OF THE BOARD DATED
APRIL 13TH, 1977

Inasmuch as an Appeal launched by the Licencees with respect to the "Order" of the Board dated the 13th day of April, 1977, was heard by the Divisional Court at Toronto, Ontario, on this date, namely, Tuesday, June 27th, 1978, and the said Appeal was dismissed by the Divisional Court, the Board hereby ORDERS that the 'LOUNGE' Licence of the Cecil Tavern be "SUSPENDED" for the period commencing at the closing hour on SATURDAY, JULY 15TH, 1978 and to continue in effect until the opening hour on MONDAY, JULY 24TH, 1978.

DATED at TORONTO THIS 27TH DAY OF JUNE, A.D. 1978.

Eber J. Rice
Chairman

ah

Registered Mail

SUPREME COURT OF ONTARIO
TORONTO MOTIONS COURT

B E T W E E N:

GORDON WALKER, MINISTER)	
OF CONSUMER AND	)	<u>J. Brian Johnston</u>
COMMERCIAL RELATIONS	)	<u>for the applicant</u>
)	
Applicant)	
)	
- and -)	
)	
LIQUOR LICENCE BOARD OF	)	<u>Julia E.A. West</u>
ONTARIO, J.B'S CORRAL II	)	<u>for the respondents</u>
RESTAURANT, 583021)	
ONTARIO LTD., JEAN)	
BIASUCCI, AND ONTARIO)	
HOTEL AND MOTEL OWNERS)	
ASSOCIATION)	
)	
Respondents	)	<u>Heard:</u> May 6, 1985

OSLER J. (Orally):

This is an application by the Minister of Consumer and Commercial Relations to quash a dining lounge licence issued to 583021 Ontario Ltd. on February 13, 1985. This matter involves the interpretation of section 6(6) of the Liquor Licence Act as amended in 1984. Section 6 as a whole deals with the procedure to be followed when an application for a licence or for approval of the transfer of a licence is made to the board. Subsection 6 is a new section which reads as follows:

Where the board is satisfied that there has been significant change in the circumstances that pertained at the time of the application that lead to the hearing under subsection 3 it may permit a reapplication within the two year period referred to in subsection 5.

The matter may appear with greater clarity if I indicate that subsection 5 provides that after a refusal no further application or licence for the same premises may be made within two years following the completion of the public hearing that preceded the refusal. In the present case it is unnecessary to give the

facts in detail. It is sufficient to say that an application was made to the board by the respondent for a dining lounge licence. The application was advertised and a hearing was held. On October 23, 1984 the board issued a notice of proposal to refuse the application and advised the applicant that it was entitled to a hearing with respect to the proposal. While the record is far from satisfactory in this respect it appears that shortly thereafter the respondent applied to the Commercial Registration Appeal Tribunal with respect to the refusal.

Meanwhile some communications occurred between the applicant and the board or its chairman and as a result without further notice, advertisement or hearing a decision was purportedly made and a licence issued as a dining lounge licence to the respondent for a room with a reduced capacity for persons.

In my view there is nothing to suggest that when the board was refused an application a new application may be made except under the provisions of section 6(6). As I have indicated that subsection provides that there must have been significant change. In this case there is no indication given in the board's correspondence or in the licence that there has been significant change. Furthermore I am unable to read subsection 6 as short circuiting or dispensing with the procedure required for an application before a licence may issue. A reapplication is all that is permitted and that reapplication surely must be for a licence.

The fact of a new application having been made must invoke the provisions of section 6 throughout, advertisements must be prepared and published and a hearing held. These steps were not taken in the present instance and in their absence the board was without jurisdiction to issue the licence and it must therefore be quashed. This action and anything I have said is of course without prejudice to the proceedings regarding the initial refusal that are now scheduled to take place before the tribunal.

RELEASED: _____

Thursday, September 24, 1987

Divisional Court
Court Room #3
Osgoode Hall

Jim Wong's Tavern Ltd
Licensee of Jimmy's
Place Tavern

and
The Liquor Licence
Board
344/86

Before The Associate Chief Justice of the High Court
(Callaghan)
The Hon. Mr. Justice Craig and
The Hon. Mr. Justice Barr

Appellant	Appeal	Respondent
R. S. Sutherland		D. W. Brown, Q.C.

10:35 R. S. Sutherland presented his argument.
11:07 D. W. Brown presented his argument.
11:23 R. W. Sutherland replied.
11:25 Court recessed
12:00 Court resumed.

Judgment:- This appeal is dismissed. While the Board in the past has relieved against the provisions of O. Reg. 581 s.9 sub.sec.6, the granting of such relief is a matter of discretion. In the instant case, there was, in our view, evidence before the Board, which in its opinion entitled it to refuse relief. In these circumstances we see no question of law which would allow this court to intervene in the matter.

Appeal dismissed without costs.
Time elapsed 1 hr. 27 min.

Office of the
Chairman

Liquor Licence
Board
of Ontario

55 Lake Shore Blvd East
Toronto, Canada
M5E 1A4

LIQUOR LICENCE ACT, R.S.O. 1980

IN THE MATTER OF LES GARS RESTAURANTS LIMITED,
LICENCEE OF LES CAVALIERS TAVERN, SITUATE AT
414-418 CHURCH STREET, IN THE CITY OF TORONTO,
PROVINCE OF ONTARIO - LICENCE NUMBER 090197

O R D E R

WHEREAS the Liquor Licence Board of Ontario at a 'Hearing' held on the date November 27, 1980, imposed a suspension of the liquor licence (Dining Lounge) issued to Les Gars Restaurants Limited, in respect of Les Cavaliers Tavern, for the period commencing at the opening hour on Monday, January 5, 1981, and continuing until the opening hour on Wednesday, January 14, 1981, and, attached a term and condition whereby the hours of sale and service of alcoholic beverages in these licensed premises would cease at 9:00 p.m. daily, effective on the date Monday, February 16, 1981.

AND WHEREAS the aforementioned Order of the Board was STAYED, pending an appeal by the Licence Holder to the Liquor Licence Appeal Tribunal (now known as the Commercial Registration Appeal Tribunal).

AND WHEREAS the said Tribunal, on May 19, 1981, confirmed the Board's Decision as aforesaid and, thus, effective at the opening hour on Monday, June 8, 1981, the Dining Lounge Licence of this Licence Holder was suspended, the said suspension to continue until the opening hour on Wednesday, June 17, 1981; further, commencing on the date Wednesday, June 17, 1981, a term and condition was attached to the Dining Lounge Licence of this Licence Holder that the sale and service of alcoholic beverages shall cease at 9:00 p.m. daily, until such time as the requirements of Section 7(5) of Regulation 1008/75 under the Liquor Licence Act, were met to the satisfaction of the Board.

AND WHEREAS the Licence Holder subsequently launched an action in this matter in the Divisional Court, thereby STAYING, once again, the enforcement of the Board's proposed sanctions.

AND WHEREAS the Licence Holder has now voluntarily agreed to a ten (10) day suspension of the liquor licence issued in

RE: LES CAVALIERS TAVERN, TORONTO

respect of these premises, contingent upon the proposed term and condition being abandoned, and on which basis the appeal presently before the Courts will be withdrawn.

THEREFORE, the Board, after due consideration of the Licence Holder's proposition, be and hereby ORDERS that its previous Order from the standpoint of a proposed suspension only will be imposed and, thus, commencing at the opening hour on Monday, January 6, 1986, and continuing until the closing hour on Wednesday, January 15, 1986, the liquor licence (Dining Lounge) of Les Gars Restaurants Limited, in respect of the Les Cavaliers Tavern, will be under suspension.

Accordingly, the sale and service of alcoholic beverages in these licensed premises will be reinstated as of the opening hour on Thursday, January 16, 1986.

DATED at TORONTO THIS 13TH DAY OF NOVEMBER, A.D. 1985.

Willis L. Blair
Chairman

avn

BY HAND

cc: Mr. T. C. Marshall, Counsel
Ministry of the Attorney General

DIVISIONAL COURT OF ONTARIO

THE HONOURABLE)
MR. JUSTICE GALLIGAN) Friday, the 22nd day
) of April, 1988

IN THE MATTER of the Liquor Licence Act, R.S.O. 1980,
Chapter 244, as amended

AND IN THE MATTER of WILLIAM F. MORRISSEY LIMITED
(MORRISSEY TAVERN)

AND IN THE MATTER of a Decision of the Liquor Licence
Board made pursuant to Section 12(1) of the Liquor
Licence Act TO SUSPEND THE LIQUOR LICENCE for a period
of three days
- Decision dated: 6th day of July, 1987

AND IN THE MATTER of a requirement for a hearing
respecting the said Decision pursuant to section 14(1)
- Requirement dated: 29th day of July, 1987

AND IN THE MATTER of a request for a stay of the said
order
- Request dated: 29th day of July, 1987

AND IN THE MATTER of the stay of the said Order
- Stay dated: 4th day of August, 1987

BETWEEN;

WILLIAM F. MORRISSEY LIMITED
(MORRISSEY TAVERN)

- Applicant -

- and -

THE LIQUOR LICENCE BOARD OF ONTARIO

Respondent

Application under LIQUOR LICENCE ACT, R.S.O. 1980,
Chapter 244, as amended, Section 18

O R D E R

THIS MOTION brought by the Licensee for a stay of the decision and Order herein appealed from, was heard this day at 130 Queen Street West, Toronto, Ontario.

ON READING the consent of the parties filed,

1. THIS COURT ORDERS that the Decision and Order of the Commercial Registration Appeal Tribunal dated December 10, 1987 is stayed until the disposition of the appeal.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTO'Leary, Southey, Hollingworth, JJ.

IN THE MATTER OF The Judicial	)	<u>Jack S. Zwicker</u>
Review Procedure Act, S.O. 1971, Vol.	)	for the applicant
2, c.48, and amendments thereto;)	
)	
AND IN THE MATTER OF The Liquor)	
Licence Act, S.O.1975, c.40 and	)	<u>Dennis W. Brown, O.C.</u>
amendments thereto;	)	for the respondent
)	
AND IN THE MATTER OF THE Order)	
of the Liquor Licence Appeal)	
Tribunal ordering that the Liquor)	
Licence Board of Ontario carry out its)	
Notice of Proposal dated the 25th)	
day of June, 1980, to refuse a dining)	
lounge licence, pursuant to the)	
provisions of The Liquor Licence)	
Act, S.O.1970, c. 40	)	<u>Heard:</u> July 10, 1981
)	
B E T W E E N:)	
)	
GIUSEPPE PARENTELA)	
)	
Applicant)	
)	
- and -)	
)	
THE LIQUOR LICENCE APPEAL)	
TRIBUNAL)	
)	
Respondent)	

SOUTHEY, J. (Orally):-

The first point raised by counsel for the applicant which we would like to mention is the argument that section 33 of The Municipal Institutions Act, (1913) 3-4 Geo. V. c. 43 had the effect of repealing By-law 551 of the former City of West Toronto, which had continued in force after the annexation of the City of West Toronto by the City of Toronto in 1909. Section 33 reads as follows:

Where a district or a municipality is annexed to a municipality, its by-laws shall extend to

such district or annexed municipality, and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed, and except by-laws conferring rights, privileges, franchises, immunities, or exemptions which could not have been lawfully repealed by the council which passed them.

We are all of the view that this section was not intended to be retrospective in effect and for that reason did not have the effect of repealing By-law 551. Such repeal would have been a matter of great significance to the residents of what had formerly been the City of West Toronto. We do not think the legislature could have intended s.33 to be retroactive in its effect and thereby to have such important results without specifically so stating. It follows, in our view, that the tribunal was right in holding that By-law 551 continued in force until the coming into force of The Ontario Temperance Act in 1916. That result is clearly implied by the decision of the Court of Appeal in the case of Croatian Estates Limited, et al. v. City of Toronto (1970) O.R. 701.

Two other points were raised by Mr. Zwicker on behalf of the applicant arising out of the wording of s.26 of the present Liquor Licence Act, which was enacted in 1975. That section reads as follows:

26. Subject to Section 27 and 28, and the regulations, no licence shall be issued or government store established of a class for the sale of liquor in a municipality,

(a) in which the sale of liquor under that class of licence or store was prohibited under the law as it existed immediately before this Act comes into force; or

(b) although the sale of liquor is not prohibited by law, no licence has been issued or government store established since the 16th day of September, 1916.

The first submission is that the sale of liquor was not prohibited under the law as it existed immediately before this Act came into force, because the preceding statute, that is, the statute in force immediately before this Act came into force, did

not in terms prohibit the sale of liquor. What the preceding statute did was to direct that no government store for the sale of liquor and no Ontario wine store should be established or authorized and no premises should be licensed in the municipality. We are all of the view that the effect of the restriction against the licensing of any premises in a municipality, unless a vote had been taken under the provisions of the statute then in force, was a prohibition under the law upon the sale of liquor in the municipality within the meaning of s. 26(a) of the present Liquor Licence Act.

The strongest point raised by the applicant in this case arises out of the failure of the legislature to carry forward into s.26 the word "or part of a municipality" that were contained in the preceding legislation. Section 71 of The Liquor Licence Act, R.S.O. 1970, c. 218 is the predecessor of s.26 of the present statute and it read as follows:

Except as provided by this Act and the regulations, no Government store for the sale of liquor shall be established, no Ontario wine store shall be licensed in any municipality or part of a municipality in which at the time of the coming into force of The Ontario Temperance Act a by-law passed under The Liquor Licence Act, being chapter 215 of the Revised Statutes of Ontario, 1914, or any other Act was in force prohibiting the sale of liquor by retail until a vote has been taken in the manner provided in Section 73.

The submission by Mr. Zwicker is that there is only one municipality at the present time and that is the City of Toronto, and that s.26(a) or (b) has no application unless the sale of liquor was prohibited or no licence has been issued in the entire municipality, that is, in the entire City of Toronto. It appears to us that s.26 was not drafted as carefully as it might have been, not only in this respect, but in other obvious respects. For example, subsection (b) should have been introduced with the words "in which" or some other words tying it in with the introductory words of the section.

There is some merit in the argument that Mr. Zwicker advances when considered purely from the standpoint of the words used in the particular section of the statute, but the result of that interpretation, as the Tribunal pointed out, would appear to be completely inconsistent with the intention of the legislature as appears from the remainder of the statute. If we gave effect to the submission by the applicant, it would mean that s.26

eliminated the need for a vote in any formerly annexed municipality in which the requirement of a vote permitting the sale of liquor had been continued by preceding legislation. It seems most unlikely that that result could have been intended, when, as was pointed out by the Tribunal, the legislature preserved by s.34 the requirement of a vote in any portion of a municipality that is hereafter annexed.

In these circumstances, we agree with the conclusion of the Tribunal that the legislature could not have intended to make such a sweeping change in the law by failing to carry forward the words "or part of a municipality" and that s.26 should be interpreted as though those words were included in it.

With that interpretation, it follows that the premises occupied by the applicant are in a part of a municipality to which s.26(a) is applicable. In these circumstances, in our view, no licence can be issued until 60% of the electors have voted in favour thereof in accordance with s.27(2) of The Liquor Licence Act, 1975.

The application will be dismissed without costs, the respondent having withdrawn its claim for costs.

Released: September 24, 1981.

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT
J. Holland, Callaghan, Trainor, JJ.

IN THE MATTER OF The Liquor
 Licence Act, Statutes of
 Ontario 1975, Chap. 40 as
 amended;

AND IN THE MATTER OF The
 Decision and Reasons of the
 Liquor Licence Appeal Tribunal
 dated August 9, 1979 varying
 the order of the Liquor
 Licence Board dated the 3rd
 day of May, 1979 attaching a
 term and condition to the
 Dining Lounge Licence issued
 to Sterio's Restaurants
 Limited, Licence No. 090168
 (Sanga Tavern, 431 College
 Street, Toronto).

B E T W E E N:

STERIO'S RESTAURANTS LIMITED

Appellant

- and -

THE LIQUOR LICENCE BOARD and
 THE LIQUOR LICENCE APPEAL
 TRIBUNAL

Respondents

D.J. Thompson,
 for the appellant

D.W. Brown, Q.C.
 for the respondents

Heard: November 13, 1980

J. HOLLAND, J., (Orally):-

The decision under appeal was the culmination of proceedings commenced by a notice of proposal which was dated April 6th, 1979 which reads:

TAKE NOTICE that pursuant to The Liquor Licence Act S.O. 1975, Ch. 40, Section 10, the Liquor Licence Board proposes to attach to your licence a TERM and CONDITION that the sale of

spirits, beer and wine shall cease at 10 p.m. and to REFUSE TO ISSUE SPECIAL OCCASION PERMITS for functions to be held in the north section, second floor of the licensed premises for the following reasons:

1. The licence holder is a corporation and is the holder of a dining lounge licence no. 090168 authorizing the sale and service of spirits, beer and wine in the main floor, north and south sections, and the second floor, north section of the establishment.

2. The sole officer and shareholder of the corporation is George TZIAVARAS.

3. Although the second floor, north section of the premises is licensed as a dining lounge, the licence holder has continuously rented that part of the licensed premises to groups and associations who apply for an obtain Special Occasion Permits for the sale of spirits, beer and wine.

4. Special Occasion Permit no. S481016 was issued to Nelson Paesch on behalf of the Confederation Latino Americano Soccer Club for a function at the Sanga Tavern, on Friday, February 2nd, 1979 between 7 p.m. and 1 a.m. On the said date, liquor was sold and supplied to three female persons who are apparently under the age of nineteen years, contrary to Section 45 (2) of The Liquor Licence Act 1975.

5. Special Occasion Permit no. S501628 was issued to R. Ghini on behalf of the Venecia Social and Cultural Club for a function at the Sanga Tavern on March 3rd, 1979 between 7 p.m. and 1 a.m.

The permit holder, contrary to Section 7(2) of the Regulations, imposed a cover charge for entry to the premises and contrary to Section 33(7) of the Regulations, failed to provide an adequate supply of food for persons attending the event.

6. Special Occasion Permit No. S506084 was issued to R. Ghini on behalf of the Venecia Social and Cultural Club for a function at the Sanga Tavern on March 10th, 1979 between 7 p.m. and 10 p.m.

At 11:10 p.m. on the said day, spirits, beer and wine were being sold and supplied to patrons, contrary to Section 33(5) of the Regulations.

7. On April 18th, 1978, the licence holder had been cautioned by the Board to exercise closer supervision of the

premises when Special Occasion Permit functions were being held.

8. The licence holder is carrying on activities that are in contravention of Section 6(5) of the Regulations in that the total receipts from the sale of liquor have exceeded the total receipts from the sale of food in the months as hereafter set out:

<u>MONTH</u>		<u>LIQUOR SALES</u>	<u>%</u>	<u>FOOD SALES</u>	<u>%</u>
July	1978	\$	8,930.86	\$	8,141.15
August	"	\$	6,566.20	\$	7,584.74
September	"	\$	9,035.10	\$	9,775.50
October	"	\$	8,010.82	\$	7,974.20
November	"	\$	8,248.30	\$	8,333.15
December	"	\$	8,793.05	\$	8,644.55

YOU ARE ENTITLED TO A HEARING BY THE BOARD CONCERNING THE ABOVE PROPOSAL IF YOU MAIL OR DELIVER TO THE BOARD WITHIN 15 DAYS RECEIPT OF THIS NOTICE BY YOU, A NOTICE IN WRITING REQUESTING A HEARING BY THE BOARD. IF YOU DO NOT REQUEST A HEARING, THE BOARD MAY CARRY OUT THE PROPOSAL STATED IN THIS NOTICE.

A NOTICE REQUIRING A HEARING SHOULD BE MAILED OR DELIVERED TO:

The Executive Director,
Liquor Licence Board of Ontario
55 Lakeshore Blvd. East,
Toronto, Ontario.
M5E 1A4

DATED at TORONTO this 6th day of April, 1979.

The licence holder requested a hearing by the Board and being dissatisfied with the decision of the Board requested a further hearing by the Liquor Licence Appeal Tribunal. The notice respecting that hearing reads:

NOTICE REQUIRING A HEARING BY THE LIQUOR
LICENCE APPEAL TRIBUNAL

TO: The Liquor Licence Board of Ontario
AND TO: The Liquor Licence Appeal Tribunal

TAKE NOTICE that Sterio's Restaurants Limited requires a Hearing by the Liquor Licence Appeal Tribunal concerning the decision of the Liquor Licence Board made the 3rd day of May, 1979 purporting to impose a condition on the licence of Sterio's Restaurants Limited that no special occasion permits be issued by the Board for the premises of Sterio's Restaurants Limited for a period of six months expiring on November 1, 1979.

The Hearing is requested on the grounds that:

1. The Liquor Licence Board improperly and unfairly sought to impose complete responsibility on Sterio's Restaurants Limited for the activities carried on by permit holders who lease space from Sterio's Restaurants Limited but otherwise had no connection with or responsibility to Sterio's Restaurants Limited.
2. The Liquor Licence Board exceeded its jurisdiction in disqualifying the premises of Sterio's Restaurants Limited from being the situs of special occasion permits since no jurisdiction to qualify or disqualify the premises is given by the Liquor Licence Act or regulations, and the Liquor Licence Board in imposing the condition on a licence was improperly doing directly what it had no authority to do directly.
3. Such further and other grounds as may be presented to the Tribunal.

DATED at Toronto, this 3rd day of May, 1979.

The decision of the Liquor Licence Appeal Tribunal rendered on August 9th, 1979 and the reasons for the decision are the subject matter of this appeal. Those reasons may be found in the appeal book at pages 13-22.

The appeal to this Court is pursuant to Section 19 of The Liquor Licence Act and is restricted to a question of law alone.

The factual background may be briefly stated.

The appellant is a holder of three licences issued by the Board for premises operated under the name Saga Tavern in Toronto. One of those licences is a dining lounge licence and covers that portion of the premises at the north end of the second floor. The licensee had however found that the operation of the dining lounge area was uneconomic and for some time had, on a continuous basis, been renting out that portion of the premises to others where activities pursuant to a special occasion permit were carried on. Such included occasions when the permit holder was selling alcoholic beverages pursuant to what is termed a special occasion-sale permit.

As appears in the notice of proposal breaches of The Liquor Licence Act and regulations occurred during certain of these occasions.

The threshold issue of law is whether a licensee has any responsibility when breaches of The Liquor Licence Act, S.O. 1975 C.40 as amended and regulations have taken place during the course of an event held under a special occasion permit in premises licensed under a dining lounge licence.

The secondary question is that if it is decided that the licensee holds such responsibility does the Board or the Appeal Tribunal have authority to impose a term and condition of a licence that would exclude the premises from being rented out to special occasion-sale permit holders for a period of time.

In a very able argument, counsel for the appellant referring to the Act and the regulations urged that a dichotomy exists between the status of a licence holder and that of a special occasion permit holder and argued that it must be that the responsibility of the licence holder ceases during the period covered by the special occasion permit and while those activities were ongoing in the licensed premises. He also urged that if there is any uncertainty in this issue then the benefit should ensure to the licence holder.

The Board here was considering a course of conduct by a licence holder who continue to rent out those premises to clubs and organizations notwithstanding the knowledge held by the licence holder that breaches of The Liquor Licence Act and regulations were being committed and permitted by these special occasion-sale permits holders.

The Liquor Licence Appeal Tribunal in its decision said at page 20:

The Tribunal is of the opinion that a licence

has a responsibility in respect of the licensed premises for compliance with the Act and regulations which is not abrogated by result of a special occasion permit in respect thereof to another person.

The dining lounge licence does not go into a state of suspension in respect of the portion to be utilized for a special occasion permit for the duration thereof. The licence continues and so does the responsibility of the licensee thereunder. To hold otherwise would be to admit a licensee who has all the advantages of a dining lounge with reduced responsibility.

I agree with this interpretation of the continued responsibility of the licence holder, notwithstanding that a special occasion permit has been issued. The Liquor Licence Appeal Tribunal's interpretation of the responsibility of the licence holder in these circumstances, in my view, is correct.

In order to determine the questions before it, the Board and Tribunal are required to interpret the sections of the statute dealing on the one hand, with licensees and their responsibilities, and on the other hand, permit holders and their responsibilities. In doing so the Board and the Tribunal were entitled to call upon their special expertise in these matters. They are charged under the statute and regulations with the suspension and administration in this province of the system under which the selling and distribution of liquor by licensees, permit holders and others is carried out. While this is not an application for judicial review, nor is there a privative clause in the statute protecting the decisions below entirely from judicial intervention, the appeal permitted is on law alone. The Tribunal has exclusive jurisdiction on the facts, and this is no doubt because of the legislative recognition of the expertise held in these matters. Because of this, the decision of the Supreme Court of Canada in Canadian Union of Public Employees Local 963 and New Brunswick Liquor Corporation, (1979) 2 S.C.R. 227 (which under an application for certiorari where the Board was protected by a privative clause) is of some assistance. At page 237 of that judgement Dickson, J. stated:

Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

Although we are here dealing with an appeal and the ordinary appellate test applies to the Tribunal's findings, I am not persuaded by the appellant that the Tribunal erred in interpreting the appropriate sections of the statute under which it operates. There is no provision in the statute or the regulations which expressly relieves the licence holder of its many responsibilities relating to the premises covered by the licence holder in these circumstances, nor do I find any such relieving provision by necessary implication. There is, in the special circumstances here, concurrent responsibility on both the licence holder and the permit holder. Appreciation of this responsibility by the licence holder will no doubt require a licence holder to exercise care in the rental of the licensed portion of its premises.

With respect to the second issue raised it is insufficient to state that providing for orderly operation of licensed premises is included in the responsibility of the Board and within the meaning of the phrase "for the purposes of the Act" as set out in section 10. Section 10 reads as follows:

10.(1) The Board may at any time review a licence or permit on its own initiative and attach such further terms and conditions as it considers proper to give effect to the purposes of this Act.

(2) The Board may, on the application of the holder of a licence or permit, remove any term or condition to which the licence or permit is made subject under subsection 1 where there is a change of circumstance.

Under section 10 of The Liquor Licence Act the Appeal Tribunal and the Board do have the power to impose as a term and condition of the licence that the licensee not rent that portion of the licensed premises for use for special occasion-sale permit for a stated period. In doing so, it is not imposing a penalty on the licensee holder for the wrongs of others, but is rather taking a step to insure conformance with the purposes of the Act and regulations.

The appeal therefore fails and is dismissed.

TRAINOR, J., (Orally)

With respect I have reached a different conclusion than the majority of this Court.

The issue on this appeal, as I understand it, has been correctly stated by Holland, J. The issue is whether the licensee has any responsibility when breaches of The Liquor Licence Act, 1975 and regulation take place following the issuance of a special occasions permit for premises licensed under a dining lounge licence where the sale of liquor is authorized by the Board to be conducted by the holder of the permit and not the licensee? The fundamental question to be answered is, did the Appeal Tribunal err in their interpretation of this Act and its regulations and thereby exceed their jurisdiction in attaching the following terms or condition to the licence of the appellant?

....that no Special Occasion Permits - Sale be issued in respect of the room located in the North Section, Second Floor, for a period of six months, and directs the Board to determine the date of commencement of the period.

In my view the Appeal Tribunal did err and did exceed their jurisdiction in imposing this condition. A fundamental principle applicable to the interpretation of this Act and similar legislation is stated by Dickson, J. in The Corporation of the City of Prince George v. Joseph E. Payne, (1978) 1 S.C.R. 458, at page 463:

The Court's sole concern is whether the Council acted within the four corners of its jurisdiction. The discretion ins. 455, wide as it is, must be exercised judicially. It is not a judicial exercise of discretion to rest decision upon an extraneous ground. The common law right of the individual freely to carry on his business and use his property can be taken away only by statute in plain language or by necessary implication.

The relevant sections of The Liquor Licence Act, 1975 and regulations are set out at pages 19 and 20 of the appeal book and are as follows:

Under Regulation 1(h)

"licensed premises" means premises for which a licence or permit, as the case may be, is issued under the Act.

Under Regulation 33 (1)

The terms and conditions applicable to the holders of the licences as set out in Section 5 apply 'mutatis mutandis' to holders of special occasion permits.

Under Regulation 33 (10)

The holder of a special occasion permit shall provide adequate security to ensure unauthorized persons do not attend the event and that the terms and conditions of the permit and the provisions of the Act and this Regulation are observed.

Under Regulations Section 5(5a)

The holder of a licence shall ensure that evidence as to the age of the person, satisfactory to the licence holder, is obtained.....

Under Regulation 46

(1) The following classes of premises are prescribed as premises on which a person under the age of nineteen may enter.

(a) premises for whichdining lounge licence has been issued:

(c) premises for which a special occasion permit has been issued which states that persons under the age of nineteen years may be admitted;

Under Section 10 of the Liquor Licence Act, 1975

(1) The Board may at any time review a license or permit on its own initiative, and attach such further terms and conditions as, it considers proper to give effect to the purposes of this Act.

Once the Board issues a permit allowing the sale to be conducted under permit as distinct from the licence the effective dominion and control of the sale is in the hands of the holder of the permit in the same way and with the same responsibilities as would be the case if the sale was otherwise conducted on the licensed premises. The Appeal Tribunal said:

The Dining Lounge Licence does not go into a state of suspension in respect of the portion to be utilized for a Special Occasion

Permit for the duration thereof. The licence continues and so does the responsibility of the licensee thereunder. To hold otherwise would be to permit a licensee to have all the advantages of a dining lounge with reduced responsibilities.

In my view the contrary is true. If the Board is correct the licensee has all the responsibilities of the legislation with few of the advantages. Where sale is authorized by permit the premises is licensed and subject to the regulations of the Act because of the permit and not the dining lounge licence. The obligations and responsibilities of the permit holder are specifically set for the in the legislation. It would appear to me that any other interpretation of the statute would result in confusion, if not chaos, and would be discriminatory to the licence holder. For example under regulation 33 (10), who would be in control and have the responsibility to provide "adequate supervision"? Under regulation section 5(5a) which of the licensee or the permittee would determine those "apparently under nineteen years of age?" Would people under nineteen be allowed on the premises if the permit did not expressly authorize it even though regulation 46a permitted it because of the dining lounge licence?

The Board and the Appeal Tribunal may impose conditions to give effect to the Act. In my view, the condition or suspension was attached as a consequence of events that were beyond the control of the appellant. Those events occurred while the premises was subject to a sale permit authorized and issued by the Board and where control of the permit holder by the Board is pursuant to section 6 and section 8 of the legislation.

The imposition of this suspension did not arise from any breach of the regulations under the appellant's licence or because of any action or inaction on his part and cannot therefore be said to have been imposed or attached "to give effect to the purposes of the Act". To hold otherwise is, in my view, to cast an additional burden on licence holders that is not a responsibility of other unlicensed competitors.

The appeal should be allowed and the order of the Liquor Licence Appeal Tribunal set aside.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTSaunders, O'Brien and Fitzpatrick, JJ.

IN THE MATTER OF The Judicial	)	<u>W.H. Roberts</u>
Review Procedure Act, R.S.O. 1980	)	for the applicant
Vol. 3, c.224;)	
)	
AND IN THE MATTER OF The	)	<u>D.W. Brown, Q.C.</u>
Statutory Powers Procedure Act,	)	Liquor Licence Board
R.S.O. 1980, Vol. 8, c.484;	)	of Ontario and the
	)	Attorney General
AND IN THE MATTER OF The Liquor	)	for Ontario
Licence Act, R.S.O. 1980, Vol. 4, c.224;)	
)	
AND IN THE MATTER OF proceedings)	
before the Liquor Licence Board of	)	<u>P. Jacobs</u>
Ontario with respect to	)	for Smardenka
Restaurant Limited	)	Restaurant Limited
)	
B E T W E E N:)	
)	
WILLIAM TEMPLE)	
)	
Applicant)	
)	
- and -)	
)	
THE LIQUOR LICENCE BOARD OF)	
ONTARIO, THE MINISTER OF JUSTICE)	
AND THE ATTORNEY GENERAL FOR)	
ONTARIO, AND SMARDENKA)	
RESTAURANT LIMITED)	
)	
Respondents	)	<u>Heard:</u> December 23, 1982

SAUNDERS, J. (Orally):-

This application for judicial review concerns a pending application for a dining licence under the Liquor Licence Act, R.S.O. 1980, c.244, by the respondent Smardenka Restaurant Limited.

The proposed premises are in a building which is located partly in the City of Toronto and partly in the Borough of York. The physical site of the proposed lounge is within the geographical

limits of the Borough of York according to affidavits filed by the respondent which are not contradicted.

Under the scheme of the statute, an applicant is entitled to a licence except where certain circumstances exist. A notice of each application must be published and a public meeting held. Mr. Temple, the applicant in this court, responded to the notice and attended the public meeting. Subsequent to the meeting, the Board by letter informed the solicitor for the licence applicant of its intention to issue a licence subject to certain conditions.

Mr. Temple seeks judicial review on three grounds:

- 1) that the proposed licensed premises are located in a municipality where the issuance of a licence is prohibited; the part of Toronto where the building is located is in what is known as a "dry" area while Borough of York, is in what is known as a "wet" area;
- 2) that the Board in reaching its decision took into account evidence received subsequent to the meeting without giving Mr. Temple an opportunity to examine, comment or make submissions in regard to such evidence; and
- 3) that the Board refused to supply reasons for its intention to grant the licence.

We are all of the view that the evidence indicates that the proposed dining lounge will be located entirely within the Borough of York and that the Board, if it sees fit to do so, may grant a licence for such an operation in such a location notwithstanding that part of the building, but not the licensed premises, is in a prohibited area. Accordingly, there is no basis on the first ground for our interference with the expressed intention of the Board.

The other two grounds fall to be decided under the general provisions of administrative law and particularly with reference to the Judicial Review Procedure Act, R.S.O. 1980, c.224 and the Statutory Powers Procedure Act, R.S.O. c.484. The threshold question is whether, in granting a licence pursuant to section 6 of the Liquor Licence Act, the Board is exercising a

statutory power of decision. While a determination under Section 6 of the Liquor Licence Act as to entitlement, or more correctly, the absence of disentitlement, may be considered to be primarily an administrative act, the definition of statutory power of decision in the two statutes to which I have referred includes deciding the eligibility of any person to receive a licence. In our view, before granting a licence to an applicant under section 6, the Board is required to make a number of determinations and in doing so, it is exercising a statutory power of decision.

The determination of the remaining two questions requires a detailed consideration of the statutory process in section 6 of the Liquor Licence Act which provides in part as follows:

- 6.(1) An application for a licence, or for approval of the transfer of a licence other than a licence referred to in section 5 (inapplicable), is entitled to be issued the licence or have the transfer approved except where,
.....
- (g) in the case of an application for a licence, the issuance of the licence is not in the public interest having regard to the needs and wishes of the public in the municipality in which the premises is located.

Subsection (3) and (4) provide:

- (3) Where an application is made for a licence under this section and, subject to compliance with clause (1)(g), the applicant is not disentitled, the Board shall advertise the fact of the application, the nature of the licence applied for and the location of the premises at least twice in a newspaper having general circulation in the municipality in respect of which the licence is applied for and shall fix in the advertisement a time and place in the licensing district for the residents of the municipality to make representations to the Board concerning the application.

- (4) The Board or such member or members thereof as are designated by the chairman shall hold a public meeting in accordance with the notice under subsection (3) for the purpose of receiving the representations referred to therein and shall take such representations into consideration for the purposes of this section.

It will be seen that the Legislature was concerned that the Board have regard to the needs and wishes of the public in application for licences and that it expressed that concern in the previously quoted provisions of the statute. On the other hand, a reading of those sections, shows a quite limited participation on the part of the public. The public is entitled to make representations to the Board concerning the application. The Board is under a duty to receive the representations and to take them into consideration. The function of the Board is primarily administrative and the degree of participation by the public is limited. The question then becomes whether the rules of natural justice apply to the process.

Recent decisions of the Supreme Court of Canada and elsewhere have indicated that while there is spectrum ranging from judicial proceedings at one end to purely administrative proceedings at the other, there is in all such proceedings an element of natural justice or the duty on the part of those charged with statutory powers of decision to act fairly.

The function of the Board in this particular case, in our view, approaches the administrative end of the spectrum and we are all of the view that the applicant Temple was not entitled to participate further than making his representations at the meeting and in particular, was not entitled to examine or comment on other material that may have subsequently been submitted to the Board by the licence applicant.

The refusal of the Board to give reasons causes us some concern. The statutory process which deals with the needs and wishes of the public may become of little significance and illusory if an applicant such as Mr. Temple cannot obtain the reason why the Board reached the conclusion that an applicant was not disentitled to the licence.

Section 17 of the Statutory Powers Procedure Act provides as follows:

17. A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party.

It was submitted on behalf of the Board and the respondent corporation that Mr. Temple was not a party and that the process which we have been considering was not a "proceedings". In our view, it would be difficult to describe the requirement whereby the Board must advertise, hold a meeting, receive, accept and consider representations as anything other than a proceeding and there is no statutory provision or authority to which we were referred which would suggest otherwise. Under other provisions of the Liquor Licence Act it is clear that Mr. Temple or other members of the public would not be regarded as parties but there is no provision relating to who or who are not parties in the process described in section 6(1), (3) and (4). Reference may be made to section 5 of the Statutory Powers Procedure Act which provides:

5. The parties to any proceedings shall be the persons specified as parties by or under the statute under which the proceedings arise or, if not so specified, persons entitled by law to be parties to the proceedings.

In a process where the public is given an opportunity to make representations, it is difficult to conclude that a person who attends the meeting and makes representations cannot be regarded as a party to that process. On that basis we consider that Mr. Temple, if he requested them, was entitled to reasons from the Board as to why it regarded the respondent as not disentitled to the licence having regard to section 6(1)(g). We should say that we do not think that Mr. Temple is entitled to anything more than that. In our view, section 6(3) confines the ambit the public participation to the issue of whether the application is not in the public interest, having regard to the needs and wishes of the public.

On this basis we would order that the licence not be issued unless and until reasons have been given to the applicant in accordance with this decision.

Released: April 5, 1983

Action #973/84

SUPREME COURT OF ONTARIO

(Divisional Court)CALLAGHAN A.C.J.H.C., (J.) HOLLAND J. AND BARR J.

IN THE MATTER OF a liquor licence)
 issued to Rocco DiGiuseppe, licence)
 of Tramps Restaurant;)

AND IN THE MATTER OF a proposal of)
 the Liquor Licence Board pursuant)
 to Section 10(3) and (11)(1) of)
 the Liquor Licence Act to revoke the)
 licence, Notice of Proposal dated)
 the 19th day of December, 1983;)

AND IN THE MATTER OF a requirement)
 for a hearing respecting the said)
 proposal, requirement dated: 20th)
 day of December, 1983.)

B E T W E E N:)

ROCCO DIGIUSEPPE, licensee of)
 Tramps Restaurant)

Ms. D. McKelvey
 for the Appellant

- and - Appellant)

LIQUOR LICENCE BOARD)

D.W. Brown, Q.C.
 for the Respondent

Respondent)

Heard: Nov. 13, 1986

CALLAGHAN A.C.J.H.C.: (Orally)

As McKelvey we would like to thank you for an excellent argument, however, we regret to advise you that in our view the appeal must be dismissed for these reasons.

On this appeal the appellant abandoned grounds one to three in the notice of appeal filed herein. The appellant submitted however, that the provisions of s.8 of the Statutory Powers Procedure Act were not complied with and that the Board erred in taking into consideration certain extraneous matters, that is to say the lack of co-operation on the part of the licence and the circumstances surrounding the existence of the adult entertainment licence.

As to the first ground of appeal, we are of the view that the appellant in the circumstances of this case had more than adequate notice of the proposal to revoke its licence within the meaning of the said Statutory Powers Procedure Act. We note that at no time between December 19, 1983, and the date of the resumption of the hearing on March 20, 1984, did the appellant seek particulars of the allegation set out in the proposal. Furthermore, the appellant had possession of the "summary" herein from and after January, 1984 and certainly called considerable evidence to rebut each of the allegations alleged at the hearing.

As to the second ground, it is clear that the Tribunal did not accept the explanations proffered by the appellant through its witnesses at the hearing. In our view, the Board was entitled pursuant to s. 6, s-s. 1, of the Liquor Licence Act, R.S.O. 1980, C.244, ("the Act") to consider the matters in issue when deciding whether the past conduct of the appellant "affords reasonable grounds for belief" that it will not conduct business in accordance with "law and with integrity and with honesty". These were matters directly relevant to those issues.

The appeal to this court is on a question of law alone (s.18, s-s. of the Act). In our view no error in law has been demonstrated on this application.

Accordingly the appeal is dismissed.

SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

IN THE MATTER OF a liquor licence issued to Rocco DiGiuseppe,
licensee of Tramps Restaurant;

AND IN THE MATTER OF a proposal of the Liquor Licence board
pursuant to Section 10 (3) and (11) (1) of the Liquor Licence
Act to revoke the licence, Notice of Proposal dated the 19th
day of December, 1983;

AND IN THE MATTER OF a requirement for a hearing respecting
the said proposal, requirement dated: 20th day of December,
1983.

BETWEEN:

ROCCO DIGIUSEPPE, LICENSEE OF
Tramps Restaurant

Appellant

- and -

LIQUOR LICENCE BOARD

Respondent

NOTICE OF ABANDONMENT

TAKE NOTICE that the Appellant, Rocco DiGiuseppe, hereby
wholly abandons motion for leave to appeal to the Court of Appeal
herein.

DATED at Toronto, this 1st day of December, 1986.

TO: The Registrar of the
Court of Appeal

WALTON C. ROSE, Q.C.
Barrister and Solicitor
47 Colborne Street
Suite 404

AND TO: Attorney General of Ontario
Crown Law Office, Civil
17th Floor, 18 King Street E.
Toronto, Ontario M5C 1C5

Toronto, Ontario M5E 1P8
Counsel for the Appellant

Attention: Dennis W. Brown, Q.C.

AND TO: Liquor Licence Board of Ontario
55 Lakeshore Blvd. East
Toronto, Ontario M5E 1A4

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

IN THE MATTER OF The Liquor Licence Act,
R.S.O., 1980, Chapter 244;

AND IN THE MATTER OF a Decision of the
Commercial Registration Appeal Tribunal, dated
August 19, 1986, upholding the Decision of the
Liquor Licence Board of Ontario dated October
22, 1985.

B E T W E E N:

VILLAGE GATE THEATRICAL PRODUCTIONS INC.,
carrying on business as THE DIAMOND RESTAURANT

Appellant,

- and -

THE LIQUOR LICENCE BOARD OF ONTARIO

Respondent.

NOTICE OF ABANDONMENT

The Appellant abandons this appeal.

February 13, 1987

ROBINS, APPLEBY, KOTLER, BANKS & TAUB
Suite 2500
130 Adelaide Street West
Toronto, Ontario
M5H 2M2

Solicitors for the Appellant

Jerry Levitan
868-1080

TO:

The Liquor Licence Board of Ontario
55 Lakeshore Boulevard East
Toronto, Ontario
M5E 1A4

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTPennell, Carruthers and Anderson. JJ.

IN THE MATTER OF THE LIQUOR)
 LICENCE ACT, 1975, CHAPTER 40;)

AND IN THE MATTER OF THE ORDER) D.R. Nash
 OF SUSPENSION made by the) for the appellant
 Liquor Licence Appeal Tribunal on the)
 16th day of March, 1978, of the) D. Brown
 Lounge Licence issued 331774) for the respondents
 Ontario Limited (Wheat Sheaves)
 Tavern) in the City of St. Thomas;)

AND IN THE MATTER OF an appeal)
 from the decision of the Liquor)
 Licence Appeal Tribunal in the)
 above matter pursuant to Section)
 19(1) of the Liquor Licence act, 1975.)

B E T W E E N:)

WHEAT SHEAVES TAVERN)
 (331774 ONTARIO LIMITED))

Appellant)

- and -)

THE LIQUOR LICENCE APPEAL)
 TRIBUNAL and THE LIQUOR)
 LICENCE BOARD OF ONTARIO)

Respondents)

Heard: October 19, 1978

PENNELL, J. (Orally):-

We are concerned here with an appeal from the decision of the Ontario Liquor Licence Appeal Tribunal, dated March 16, 1978, which in effect affirmed the decision of the Liquor Licence Board of November 24, 1977, ordering the suspension of the lounge licence held by the appellant for five days on the ground that the appellant had carried on activities on the licensed premises that were contrary to Regulation 1008/75 of The Liquor Licence Act, 1975, s.o. 1975, c.40.

It is material to the determination of this appeal to set out the particulars of the allegations as they appear in the notice of proposal:

- a) On Saturday, September 24th, 1977 around midnight and Saturday, October 8th 1977 around midnight, the officers and employees of the licence holder failed to ensure that the premises was not overcrowded, pursuant to section 5, subsection (12) of the Regulations.
- b) On Saturday, October 8th, shortly after midnight, there were two patrons seated at the bar in an apparently intoxicated condition.
- c) At 1:40 a.m. of the following day, patrons were consuming liquor on the premises and the licence holder had failed to remove all evidence of the service and consumption of liquor as required by section 6, subsection (20) of the Regulations.

To promote convenience I shall refer to these allegations as: (a) the charge of the overcrowding contrary to s. 5(12) of the Regulations; (b) a charge of permitting apparent drunkenness on the premises contrary to s.5(4) of the Regulations; and (c) a charge of failure to remove all evidence of service and consumption of liquor, contrary to s.6(20) of the Regulations.

It is to be observed, although it is not material to the present hearing, that the Liquor Licence Board made a finding inter alia that the applicant offended s-s.(21) of s.6 of the Regulations, though there was no such allegation specified in the notice of proposal which was served on the appellant. To pursue this point to its conclusion, I note that the Liquor Licence Appeal Tribunal, though affirming in essence the decision of the Liquor Licence Board, considered only the evidence related to the allegations specified in the notice of proposal. Stated differently, the provisions of s.6(21) played no part in the Appeal Tribunal's decision.

I do not think that it is necessary or useful to dwell upon the evidence which was adduced at the hearing before the Appeal Tribunal which was a hearing de novo. In substance, the

argument of the counsel for the appellant before this Court was two fold: first, it is said that there was no evidence in support of the finding that the appellant had permitted drunkenness on the licensed premises; and, no allegation had been made that s.5(4) of the Regulations had been breached, and I will deal with these points in order.

In my view, there was evidence adduced before the Appeal Tribunal upon which it could make a finding that constituted a breach of s. 5(4) of the Regulations. As regard to the submission that there was no allegation in the notice of proposal that constituted an adequate or valid allegation, pursuant to the Regulations, I do not ignore the fact that the words "section 5, subsection (4) of the Regulations are not to be found in the notice of proposal", but I do not think that these words in themselves are fatal to the adequacy or validity of the notice of proposal. Secondly, the point is taken that the particulars, as already stated, refer to patrons "in an apparently intoxicated condition". Section 5(4) of the Regulations reads as follows:

- 4) No holder of a licence shall permit any
... drunkenness ... in the licensed premises.

The impugned allegation reads:

....there were two patrons seated at the bar
in an apparently intoxicated condition.

It perhaps might be said with perfect accuracy that the allegation in the notice of proposal is not spelled out with the fullness that could have been achieved, but in my respectful submission, it is stated with sufficient definitiveness so that the appellant could not be taken by surprise. As I say, my first reaction was that the argument was not without substance, but I think on balance that the argument cannot hold.

As I read the notice of proposal, the appellant could not be left in any doubt as to the natures of the particular allegations, namely, that it permitted drunkenness to take place on the premises. Secondly, the argument is made that the Appeal Tribunal erred in law in finding that there was a breach of s. 6(20) of the Regulations on October 9th since no allegation had been made that the Regulations had been breached on that particular day. True it is that the date "October 9th, 1977" is not to be found in the notice of proposal. However, there is an express allegation of a breach of the Regulations "On Saturday, October 8th 1977 around midnight," and "On Saturday, October 8th, shortly after midnight," The evidence with respect to these particular allegations speaks of acts occurring at "1:40 a.m." on

October 9th, that is the alleged breach of s. 5(4) of the Regulations, and another instance of acts occurring at "12:20 a.m." on October 9th, 1977 and these acts relate to the alleged breach of s. 5(12).

Speaking for myself, I think that the time specified in the notice of proposal and the time stated in the evidence on the allegations are sufficiently proximate given the nature of the allegations and the circumstances of the case as to satisfy the degree of particularity required in the notice of proposal.

The rudiments of justice, as we know it, call for proper notice and a fair hearing. The appraisal of a fair hearing must be tested by the totality of the facts in a given case and the nature of the proceeding, i.e. civil or criminal. I conclude here that the appellant was provided with understandable statements of the allegations against it and with sufficient definitiveness to provide it with a fair opportunity to meet the allegations.

In my judgement, the Appeal Tribunal did not err in law, and for these reasons, I would dismiss the appeal. No order as to costs.

Released: January 8, 1979.

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

THE HONOURABLE)	MONDAY, THE 8TH DAY
)	
MR. JUSTICE HENRY	)	OF FEBRUARY, A.D., 1982

IN THE MATTER OF The Statutory Powers
Procedure Act, 1971, Chapter 47;

AND IN THE MATTER OF The Mortgage Brokers Act,
R.S.O. 1970, Chapter 278, Section 6 as
amended;

AND IN THE MATTER OF The Commercial
Registration Appeal Tribunal;

AND IN THE MATTER OF a proposal of the
Registrar of Mortgage Brokers to refuse to
renew the mortgage brokerage registration of
Zenon Bril;

AND IN THE MATTER OF an application for a
hearing by the Commercial Registration Appeal
Tribunal by Zenon Bril.

B E T W E E N:

ZENON BRIL

Applicant,

- and -

THE REGISTRAR OF MORTGAGE BROKERS

Respondent.

O R D E R

UPON motion made this day, to the Court, on behalf of the Respondent, Registrar of Mortgage Brokers, for an Order that the application for judicial review herein be dismissed for want of prosecution, and upon reading the affidavit of Sharron Liberty, filed, and upon hearing counsel for the Respondent, no one appearing on behalf of the applicant, although duly served:

1. IT IS ORDERED that the within application be and the same is hereby dismissed.

Deputy Registrar, S.C.O.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Rose

SOUTHEY J.

16TH JULY 1982.

Practice - Application for stay of execution of decision of Commercial Registration Appeal Tribunal - Appeal from decision of tribunal to Divisional Court - Divisional Court has jurisdiction to stay execution - Statute authorizes tribunal to grant stay itself pending appeal - Unless special circumstances application for stay must first be made to tribunal - Mortgage Brokers Act, R.S.O. 1980, c.295, s.6 - Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c.274, s.11 - Rule 506 - Collection Agencies Act, R.S.O. 1980, c.73, s.8(9).

The applicant sought a stay of the oral decision of the Commercial Registration Appeal Tribunal directing the Registrar of Collection Agencies to refuse to renew his registration as a collection agency. The reason for the refusal to renew was that the applicant was disentitled to registration under s.6 of the Act because he was registered as a mortgage broker under the Mortgage Brokers Act, R.S.O. 1980, c.295, which provides that no person who is registered as a collection agency shall engage directly or indirectly in the business of lending money whether as principal or as agent. The applicant contended that the person engaged in the business of lending money was a corporation of which he was the president.

Held: the stay should be refused.

Section 11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c.274 provides for an appeal on questions of law or fact or both from the tribunal to the Divisional Court and authorizes the Court to substitute its opinion for that of the registrar or of the tribunal. This section would enable the Divisional Court to make the order sought. Section 8(9) of the Collection Agencies Act, R.S.O. 1980, c.73 provides for the immediate effect of an order of the tribunal with the right in the tribunal to grant a stay until disposition of any appeal to the Divisional Court. In the absence of special circumstances and in a situation where there is no written decision of the tribunal, an applicant ought not to apply to the Divisional Court for a stay unless he has first applied for the stay to the tribunal as he has the right to do under s.8(9).

APPLICATION for an order staying execution of a decision of the Commercial Registration Appeal Tribunal.

Roger G. Oatley, for applicant.
Michael Bader, for respondent.

SOUTHEY J. (orally):- This is an application by the appellant, Jeremiah J. Rose, for an order staying execution of a decision of the Commercial Registration Appeal Tribunal, dated July 7, 1982, directing the Registrar of Collection Agencies to carry out a proposal made by him to refuse to renew the registration of the appellant as a collection agency. That proposal was dated January 14, 1982.

The reason for the proposed refusal to renew registration is that the registrar was of the opinion that the appellant was disintituled to registration under s.6 of the Act because he was registered as a mortgage broker under the Mortgage Brokers Act, R.S.O. 1980, c.295. Section 13(13) of R.R.O. 1980, Reg. 103 provides that no person who is registered as a collection agency shall engage directly or indirectly in the business of lending money whether as principal or as agent. The response of the appellant to the registrar was that it was ok he, the appellant, who was engaged in the business of lending money. That business is carried on by a corporation, Allendale Financial Services Limited, of which he is the president.

I propose to give reasons for judgment because there is a genuine difference between counsel as to the effect of the relevant rules and statutory provisions regarding the power of the Divisional Court to grant a stay.

The right of the appellant to appeal to the Divisional Court is derived from s.11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c.274, Section 11(1) of that Act provides as follows:

11(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the Divisional Court in accordance with the rules of court.

The powers of the Divisional Court on the appeal are set out in s.11(5) of the statute and are as follows:

11(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer

the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Mr. Bader, on behalf of the respondent, contended that the Divisional Court has no jurisdiction to order a stay of execution in this case because of s.8(9) of the Collection Agencies Act, R.S.O. 1980, c.73 which reads as follows:

8(9) Notwithstanding that a registrant appeals from an order of the Tribunal under section 11 of the Ministry of Consumer and Commercial Relations Act, the order takes effect immediately but the Tribunal may grant a stay until disposition of the appeal.

He also contended that there was no automatic stay of execution under Rule 506(1) [am. O. Reg. 251/79, s.1] because of s.8(9), which he asserted was a statute which "otherwise provided" within the meaning of Rule 506.

May I first say that I do not agree with Mr. Bader's interpretation of Rule 506(1). The exception stipulated in that rule in a situation where a statute otherwise provides is an exception to the provision of the rule that there may be no stay of execution. The exception has no application, in my judgment, to a situation where the statute in question provides that there shall be a stay. It relates to statutes which provide that there shall be a stay.

Apart from Rule 506 however, Mr. Bader contended that s.8(9) of the Collection Agencies Act removes any power that the Divisional Court might otherwise have to grant a stay in this type of appeal until disposition of the appeal. He argued that s.11(5) giving the Court all the powers of the tribunal, refers only to powers that the Court may exercise on the appeal, by which I take it he meant on the hearing of the appeal or after the hearing. While there may be merit in his contention, it is my view that it places too narrow a construction on the powers given to the Court under s.11(5). In my view, the Divisional Court has jurisdiction under s.11(5) to order a stay in its discretion.

I am concerned in this case by the fact that the tribunal has not issued any written order and there are not reasons for judgment or any transcript available of the evidence given before the tribunal. I find myself faced with the difficult situation where counsel disagree as to what was said at the hearing.

I am satisfied that the appellant ought not to be prevented from applying for a stay of execution by reason of the fact that

no written order has been issued by the tribunal. I sat last week on a panel of this Court hearing an application for judicial review with respect to a decision of an administrative tribunal, not the tribunal involved in this case, in which the tribunal issued a written decision some eight months after giving its decision orally.

According to counsel for the appellant, his client has been informed by the tribunal involved in this case that the order given orally will be executed on July 20, 19812, by the closing of the doors of his business, notwithstanding that no written decision has been issued. I am satisfied, in these circumstances, that the Court has the discretion to grant a stay, if it sees fit to do so.

Mr. Bader has persuaded me, however, that no such stay should be granted in this case because the appellant has not seen fit to apply to the tribunal for a stay under s.8(9) of the Collection Agencies Act. Although it appears to me that it might be appropriate to stay execution in this case, having regard to the drastic financial damage the decision will do to the business of the appellant and the fact that the proposal has been outstanding now for more than six months (from which I infer that the matter is not one of great urgency), I am very much aware that the tribunal has a great deal more knowledge about the facts of the case than I do. In my judgment, an appellant in a case such as this, where a statutory provision like s.8(9) is in force, ought first to make application for a stay to the tribunal. If the tribunal refuses to grant the stay, then, in my judgment, the appellant can apply for a stay to this Court, not by way of appeal from the order of the court below, but in exercise of its powers under s.11(5) of the Ministry of Consumer and Commercial Relations Act.

It may be that an application to this Court for a stay following refusal of a stay by the tribunal should be properly characterized as an appeal from the decision of the tribunal against a stay. In my judgment, however, it makes no difference what label is properly put on the application to this Court for a stay. I am quite satisfied that the Court has the power to grant a stay in proceedings before it, whether by way of appeal or otherwise, notwithstanding a prior refusal of a stay by the tribunal. The point which I seek to emphasize is that, in the absence of special circumstances, an appellant ought not to apply to this Court for a stay unless he has first applied to the tribunal below. In this case, in my view, the appellant ought to apply forthwith to the tribunal for a stay. If it is refused he may renew this motion to this Court.

For these reasons the application is dismissed. There will be no costs because I think counsel had good reason to be uncertain as to the proper procedure.

Application dismissed.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTWELLS, C.J.H.C., WRIGHT AND HOLLAND, JJ.

IN THE MATTER OF The Motor Vehicle	)	<u>R.P. Smith</u>
Dealers Act (formerly The Used Car	)	for Appellant-respondent;
Dealers Act, R.S.O. 1970, c. 475,)	
as amended by S.O. 1971, Vol. 2,)	
chaps. 21 and 50))	
)	
BETWEEN;	)	<u>D.E. Rolls, O.C.</u>
	)	for Respondents-applicant
ALEXANDER LESLIE AND SON MOTOR)	
SALES)	
)	
Applicants)	
(Respondents))	
- and -)	
)	
REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Respondent	)	<u>Heard: October 3rd, 1973.</u>
(Appellant))	

WRIGHT, J. for the Court (Orally):

This is an appeal from the decision of the Commercial Registration Appeal Tribunal delivered on August 4th, 1972, which granted registration to Alexander Leslie as a motor vehicle dealer under the firm name of Sun Motor Sales and as a salesman under his own name. We are asked to set aside the decision of the Commercial Registration Appeal Tribunal and that an order be made denying Leslie registration in any event.

The circumstances that we are concerned with can be very briefly put because they are fully dealt with in a letter of decision by the Registrar under the Motor Vehicle Dealers Act dated June 16th, 1972, and the full and reasoned decision of the Tribunal which is before us in appeal.

In substance, it was the view of the Registrar that the activities of Leslie as a salesman for Wishing Well Service Centre

were such that it was reasonable to assume that Mr. Tomlinson who was the licensed owner of Wishing Well Service Centre was merely a front for Mr. Leslie. This issue was fully considered by the Tribunal below. The evidence on which the suspicions and conclusion of the Registrar were based was put before the Tribunal. Mr. Tomlinson could not be found and did not testify and the applicant, Alexander Leslie, appeared, testified and was cross-examined.

In these circumstances, having examined the evidence and the decision, we are not prepared to alter the decision of the Tribunal or make any direction under the Act. We confirm the decision of the Tribunal and dismiss the appeal with costs.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTO'Leary, Grange and Carruthers, JJ.

IN THE MATTER OF The Motor)	
Vehicle Dealers Act, R.S.O. 1970	)	<u>M.W. Bader,</u>
Chapter 475 and amendments thereto;	)	for the appellant
)	
AND IN THE MATTER OF The	)	no one appearing
Ministry of Consumer and	)	for the respondent
Commercial Relations Act, R.S.O.)	
1970, Chapter 113 and amendments)	
thereto)	
)	
B E T W E E N:)	
)	
THE REGISTRAR OF MOTOR)	
VEHICLE DEALERS AND)	
SALESMEN)	
)	
Appellant)	
- and -)	
)	
LLOYD ALFRED BACCHUS)	
)	
Respondent	)	<u>Heard: June 27, 1978</u>

GRANGE J.(Orally):-

This is an appeal by the Minister of Consumer and Commercial Relations from the order of the Commercial Registration Appeal Tribunal granting the applicant Lloyd Alfred Bacchus registration as a salesman under The Motor Vehicle Dealers Act, R.S.O. 1970, c. 475 on certain conditions. In the course of its reasons, the tribunal stated that it had found: first, that the applicant whilst unregistered carried on the business of a motor vehicle dealer; second, that the applicant failed to discharge three liens on motor vehicles referred to in evidence after the sale by the applicant; third, that the applicant is an undischarged bankrupt facing a charge of fraud; and fourth, that the applicant fell into financial difficulties from which he tried to extricate himself by "borrowing from Peter to pay Paul".

It is our view that the evidence before the tribunal amply justified those findings of fact and may well have justified a further finding of fact that the applicant had failed to inform the purchasers of the existence of the liens when he was selling motor cars. In any event, it is our opinion that such being the findings of fact, the applicant should not have been permitted registration on any terms and his application should, as originally proposed by the registrar, have been refused.

We would allow the appeal accordingly and set aside the order of the tribunal and reinstate the order of the registrar. In the circumstances, we are of the view that there should be no costs of the appeal.

Released: July 17, 1978.

IN THE SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

THE HONOURABLE MR.)	
JUSTICE SOUTHEY)	
)	
THE HONOURABLE MR.	)	MONDAY, THE 5TH DAY OF
JUSTICE J. HOLLAND)	
	)	JULY, A.D. 1982.
THE HONOURABLE MR.)	
JUSTICE ANDERSON)	

IN THE MATTER OF THE MOTOR VEHICLE DEALERS ACT,
R.S.O. 1980, CHAPTER 299;

AND IN THE MATTER OF ANTONIO BALDASSARRE OF
THE CITY OF TORONTO, MOTOR VEHICLE SALESMAN;

AND IN THE MATTER OF AN APPEAL NOW PENDING
UNDER SECTION 9b OF THE MINISTRY OF CONSUMER
AND COMMERCIAL RELATIONS ACT, R.S.O. 1980,
CHAPTER 274.

B E T W E E N :

THE REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN

Respondent

-and-

ANTONIO BALDASSARRE

Appellant

J U D G M E N T

UPON application made unto this Court, this day, by Counsel on behalf of Antonio Baldassarre, by way of an appeal from the decision given by the Commercial Registration Appeal Tribunal on the 11th day of February, 1981, in the presence of Counsel for the appellant, and for the Respondent, upon reading the decision aforesaid, and upon hearing what was alleged by Counsel aforesaid:

1. THIS COURT DOTH ORDER AND ADJUDGE that the appeal be, and the same is hereby dismissed.

Registrar, Court of Appeal

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTREID, SOUTHEY, KREVER, JJ.

IN THE MATTER OF The Motor	)	<u>Richard A. Dinham</u>
Vehicle Dealers Act, R.S.O.1980	)	for the applicant/respondent
Chapter 299;)	
)	
AND IN THE MATTER OF The	)	<u>Michael Bader</u>
Ministry of Consumer and	)	for the respondent/appellant
Commercial Relations Act,)	
R.S.O. 1980, Chapter 274)	
)	
AND IN THE MATTER OF the)	
Decision and Order of the)	
Commercial Registration)	
Appeal Tribunal)	
)	
B E T W E E N:)	
)	
RICHARD G. BRENNER)	
)	
Appellant)	
(Respondent))	
)	
- and -)	
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Respondent	)	<u>Heard:</u> March 9, 1983.
(Appellant))	

SOUTHEY, J. (Orally):

This is an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from the decision and order of the Commercial Registration Appeal Tribunal made on March 30, 1981, wherein the Tribunal directed the Registrar to grant conditional registration to the respondent, Brenner, subject to terms and conditions stated in its reasons.

The matter came before the Tribunal because the Registrar had proposed to refuse to grant registration as a motor vehicle salesman to Brenner because the Registrar was of the opinion that the past conduct of Brenner afforded reasonable grounds for belief

that he would not carry on business in accordance with law and with integrity and honesty. The Registrar, in the notice of his proposal, went on to state that this opinion was based on the fact that Brenner had an extensive criminal record involving, as it was then believed, fourteen convictions over the twenty year period ending January 25, 1979. It now turns out that there were three other convictions which had not been disclosed by Brenner in his application for a licence, although the Registrar did not attach importance to those additional convictions which were for relatively minor offences.

Brenner disclosed a number of convictions which must be regarded as very serious in the context of his application, the last one being Detroit, Michigan, in January, 1979, for fraud, as a result of which he was sentenced to 3 years in prison. The other convictions that I am sure were regarded as of particular importance by the Registrar were a conviction for theft in June of 1959, at which time Brenner was 16 years of age; a conviction of attempted armed robbery in 1962, for which he was sentenced to 2-1/2 years imprisonment in penitentiary; a conviction in October, 1975, of possession of narcotics, for which he was sentenced to 30 days in jail; a conviction in January, 1977, for possession of credit cards and use of credit cards, for which he was sentenced to 5 days in jail; and a conviction in January, 1979, for theft over \$200 for which he was fined \$500. Brenner served some 22 months of his sentence for fraud and then was paroled from prison in the United States and permanently deported to Canada. After working for several months in another job, he was employed by one, Winkler, in an enterprise known as J and B Auto Wreckers (Essex) Limited. Although the exact date and times do not emerge from the record before the Tribunal, it appears that the applicant may have been employed for about a year with Mr. Winkler's company and that a position was available for him with that company if he were able to obtain a licence to sell motor vehicles.

At the time of the hearing before the Tribunal, he was not employed by J and B Auto Wreckers (Essex) Limited because business had slowed down and there was not sufficient work for him in the operations of the company other than that of selling vehicles.

The Tribunal heard evidence from Mr. Winkler that he was prepared to employ Brenner and that he considered him to have turned over a new leaf and to be on the road to rehabilitation. The Board also heard from a criminal lawyer in Windsor, Mr. Tait, who gave evidence that he was most impressed with the change in the conduct of Brenner since his return from incarceration in the United States.

On the basis of that evidence, the Board's decision was that "possibly the applicant will in the future, be a person of honesty and integrity". Later in its decision, the Tribunal said "We believe Mr. Brenner should upgrade himself. We think he would feel better if he could do this. He is not alone in his desire to do so. We are willing to encourage that objective." We are all of the view that the Tribunal appears to have applied the wrong test in determining whether the proposal made by the Registrar should have been carried out.

The Registrar proposed to refuse registration because of the existence of the specific circumstances set out in s.5(1)(b) of the Motor Vehicle Dealers Act. I quote that section:

the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and,

accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

Almost a year has now elapsed since the Board gave its decision. The Registrar did not apply for a stay of the operation of the Tribunal's decision and the result is that Brenner received his licence and, as far as counsel is aware, has been employed as a motor vehicle salesman by Mr. Winkler's company since April 14, 1982. In these circumstances we think it would be unjust for us to set aside the order of the Tribunal and to direct the Registrar to carry out his proposal, which is based on the facts as they existed at July 15, 1981. It may be that the Tribunal, if it heard the matter afresh and gave effect to the principles that we have laid down in our reasons, might now be able to conclude that the past conduct of Brenner no longer affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty, despite his lengthy criminal record. Such a conclusion might be reached after a consideration of his conduct during the past year and if Brenner adopts a more forthright attitude in his evidence regarding the conviction for fraud in Michigan or gives a credible explanation as to why he refused to reveal to the Tribunal the nature of the offence to which he pleaded guilty.

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Accordingly, we refer the matter back to the Tribunal for rehearing with the direction that the order appealed from remain in force as a interim order until the Tribunal has given further consideration to the matter at a second hearing.

The appellant does not ask for costs and, accordingly, there will be no order of costs on the appeal.

Released: April 7, 1983

IN THE SUPREME COURT OF ONTARIO
(DIVISIONAL COURT)

THE HONOURABLE MR. JUSTICE)	
REID)	
)	
THE HONOURABLE MR. JUSTICE	)	WEDNESDAY, THE 9TH DAY OF
SOUTHEY)	
	)	MARCH, A.D. 1983
THE HONOURABLE MR. JUSTICE)	
KREVER)	

IN THE MATTER OF The Motor Vehicle Dealers Act,
R.S.O. 1970, Chapter 475, as amended;

AND IN THE MATTER OF The Ministry of Consumer
and Commercial Relations Act, R.S.O. 1980,
Chapter 274;

AND IN THE MATTER OF the Decision and Order of
the Commercial Registration Appeal Tribunal

B E T W E E N:

RICHARD G. BRENNER

Applicant (Respondent)

- and -

THE REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMAN

Respondent (Appellant)

O R D E R

UPON application made unto this Court by the Registrar of Motor Vehicle Dealers and Salesmen by way of an appeal from the Decision and Order pronounced by the Commercial Registration Appeal Tribunal on the 30th day of March, 1982, in the presence of Counsel for the Appellant and Respondent, upon hearing read the Decision and Order aforesaid, and upon hearing what was alleged by Counsel aforesaid:

1. THIS COURT DOTH ORDER that the appeal be and the same is hereby allowed, and that the matter be referred back to the Tribunal for a rehearing in accordance with the reasons given herein.

2. AND THIS COURT DOTH FURTHER ORDER that the said Order shall remain in force as an interim Order pending the decision of the Tribunal at such further hearing.

3. AND THIS COURT DOTH FURTHER ORDER that there be no costs.

IN THE SUPREME COURT OF ONTARIO

IN THE DIVISIONAL COURT

THE HONOURABLE, THE CHIEF JUSTICE	)	WEDNESDAY, THE 19TH
OF THE HIGH COURT	)	DAY OF JUNE, 1974
)	
THE HONOURABLE MR. JUSTICE DONOHUE)	
)	
THE HONOURABLE MR. JUSTICE THOMPSON)	

IN THE MATTER OF The Motor Vehicle
Dealers Act, R.S.O. 1970, chapter
475, as amended

B E T W E E N;

PETER CALDERONE and P. C. AUTO SALES

Applicant

- and -

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

J U D G M E N T

UPON motion made on the 19th day of June, 1974 unto this Court by counsel on behalf of the applicant by way of Appeal and Application for Judicial Review from the Order pronounced by the Commercial Registration Appeal Tribunal dated March 12, 1973, in the presence of counsel for both parties and upon hearing read the proceedings and the Order aforesaid, upon hearing what was alleged for both parties and upon hearing read the proceedings and the Order aforesaid, upon hearing what was alleged by counsel aforesaid and upon reading the Minutes of Settlement made between the parties hereto, and filed;

1. THIS COURT DOTH ORDER that the Application for Judicial Review (Certiorari) herein be and the same is hereby dismissed without costs.

2. AND THIS COURT DOTH ORDER that the Appeal herein be allowed and that the issue of an appropriate penalty to be imposed against Peter Calderone be referred back to the Commercial Registration Appeal Tribunal.

3. THIS COURT DOTH FURTHER ORDER that the penalty to be imposed shall be made without regard to the following findings of the Tribunal, which finding is set aside:

" the applicant gave false information and a false affidavit in his application for registration as a salesman dated April 5, 1972 (Exhibit 2 "S") ".

The penalty imposed shall only be based on the Tribunal's second finding which appears at pages 10 - 11 of the Tribunal's decision herein dated the 12th day of March, 1973.

4. THIS COURT DOTH FURTHER ORDER that the respondent shall pay to the applicant his costs of the appeal fixed in the sum of \$200.00.

Assistant Registrar S.C.O.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTWELLS, C.J.H.C., WILSON, J. AND OSLER, J.

IN THE MATTER OF THE MOTOR VEHICLES)	<u>W.J. Smith, Q.C.</u>
DEALERS ACT, R.S.O. 1970, c. 475,)	
)	for Appellant
AND IN THE MATTER OF the revocation)	
of the certificate of registration)	
of Cross-Canada Car Leasing Limited;))	
)	
AND IN THE MATTER OF in The Judicial))	<u>C.M. Powell and E. Then</u>
Review Procedure Act, R.S.O. 1970,)	
Section 2(1);)	for Respondent
)	
BETWEEN:)	
)	
CROSS-CANADA CAR LEASING LIMITED)	
SALES)	
)	
Applicant)	
)	
- and -)	
)	
THE REGISTRAR OF MOTOR VEHICLES)	
DEALERS AND SALESMEN and THE)	
REGISTRAR OF COMMERCIAL REGISTRATION))	
APPEAL TRIBUNAL)	
)	
Respondent)	
)	<u>Heard: December 4th, 1972</u>

WILSON, J. (Orally):

This is an application by Cross-Canada Car Leasing Limited for an order that The Registrar of Motor Vehicle Dealers and Salesmen and Commercial Registrations Appeal Tribunal be prohibited from taking any further proceedings in this matter and for a declaration that the applicant, Cross-Canada Car Leasing Limited, does not require a motor vehicle dealers license for the purposes of carrying on its leasing business, and for such further and other order as may seem just upon the following grounds:

- (a) The Registrar of Motor Vehicle Dealers and Salesmen had no jurisdiction herein, and

- (b) that the applicant, Cross-Canada Car Leasing Limited is not subject to the provisions of The Motor Vehicle Dealers Act.

The argument before us was mainly confined, as I understood it, to ground (b). A brief statement of the applicant's business is that it buys motor cars and leases them to lessees under two different types of lease, upon which nothing turns so far as this application is concerned. At the end of the terms of the leases the cars are sold, 23% to dealers who from time to time negotiate purchases from the applicant, 24.75% to an associated company Camp Cars Limited which sells to the public, 11.65% by public auction to dealers, 28.5% by sales outside the Province of Ontario, mostly to motor vehicle dealers and 12.1% are disposed of by private sales, presumably in Ontario.

The question that has been argued before us is whether or not the applicant is in the business of buying and selling cars in the sense that the ordinary car dealer buys from a manufacturer and sells to the public.

The applicant company has been registered under the Act for many years. It has, up to now, notwithstanding its present contention that it is not subject to The Motor Vehicle Dealers Act, continued to be registered. It could have requested cancellation, which is provided for in Section 6(2) of the Act:

"... the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering his registration."

We are of the opinion that in the circumstances and at the present time the applicant cannot say it is not subject to the Act and the application should be dismissed. The applicant is registered under the Act and should be dealt with in accordance with the procedure that is there provided.

The application will be dismissed with costs.

WELLS, C.J.H.C. (Orally)

I agree with the reasons of my brother

OSLER, J. (Orally)

I agree and having nothing to add.

Released: December 18th, 1972.

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

Wells, C.J.H.C., Wright, J., and Holland, J.

IN THE MATTER OF The Motor Vehicle))	
Dealers Act, (Formerly The Used )	)	A. Maloney, Q.C. and
Car Dealers Act) R.S.O., 1970, )	)	<u>D. O'Connor</u>
Chapter 475, as amended; )	)	for applicant
)	
AND IN THE MATTER OF CAMP CARS))	
LIMITED and CROSS-CANADA CAR )	)	C. Powell and
LEASING LIMITED, )	)	<u>E. Then</u>
Applicants )	)	for respondent
)	
THE REGISTRAR OF MOTOR VEHICLE))	
DEALERS AND SALESMEN,))	
Respondent )	)	<u>Heard: June 29, 1973.</u>

WRIGHT, J.:

As this appeal was developed before us, the issue for our decision was whether revocation of the appellants' certificates of registration as motor vehicle dealers, was too heavy a penalty.

It was imposed first on September 22, 1972, by the Registrar under The Motor Vehicle Dealers Act, R.S.O. 1970, c.475, R.G. MacCormac after an investigation, and second, on January 26, 1973 by a decision and order of The Commercial Registration Appeal Tribunal (Jacie C. Horwitz, Q.C., Mrs. Helen J. Morningstar and F. William Daglish) after three days of hearings.

The Tribunal found:

"1. Grover Camp Robertson, D.B. Hetherington and William Gow, directors and/or officers of the associated applicant corporations, conspired together wilfully and knowingly to alter or permit alteration to the odometer readings in excess of 1,600,000 miles on 120 of its lease-expired motor vehicles from March 1, 1971 to June 30, 1972, contrary to section 19(1) of Ontario Regulation 98/71, as amended, of The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, (formerly The Used Car Dealers Act, 1968-69) as amended.

2. The Applicants did not cease to do so until after the commencement of the investigation by the Respondent Registrar on July 11, 1972.

3. The Applicants did falsely misrepresent these 120 vehicles to the subsequent purchasers thereof and committed a fraud on the unsuspecting public.

4. The Applicants' motivation was to increase their sales and profits by obtaining higher prices for said motor vehicles at the expense of the general public.

5. No adjustments or refunds were made to 11 purchasers of said vehicles until the purchasers complained to the applicants, nor did the Applicants attempt to contact any other purchasers of the remaining 109 vehicles.

6. Grover Camp Robertson, despite his lengthy experience in the motor vehicle industry and his past good character, acted in a most reprehensible manner in association with his general manager, D. B. Hetherington, and assistant general manager, William Gow, in this entire matter."

In considering sentence, they said:

" The Court of Appeal of the Supreme Court of Ontario in the matter of The Registrar of Used Car Dealers and Salesmen and Robert Rowe Limited and Robert Rowe on October 24, 1972 (summarized in [1972] 3 O.R. 481 (Blue)) stated:

'In our view, the Statute and the regulations were passed in the interest of, and for the protection of, the public. Their enforcement, in our view, would be greatly hampered by a decision which in effect imposed a penalty of "probation" with terms, which for practical purposes have no meaning at all, in a case where very serious offences, numerous in themselves, and, it seems to us, obviously important to the public, were shown to have been committed by the dealership whose registration is under question.

Some analogy and assistance is gained from the decision of Chief Justice Robertson in Re Securities Act and Morton, [1946] O.R. 492, cited to us on this appeal, but in another connection. At p.494, Robertson, C.J.O. said:

"The Commission is to suspend or cancel a registration where, in its opinion, such action is in the public interest: s.10. A registered broker or salesman has no vested interest that is to be weighed in the balance against the public interest. I have no doubt the Commission will, on proper occasions, give serious consequences of taking away a man's livelihood, and of making the business of a broker or salesman a precarious occupation. Such considerations may have their proper place in determining what is in the public interest. It is however, the public interest that is to be served by the Commission, and not private interests or the interests of any profession or business, in the exercise of the Commission's powers of suspension or cancellation of the registration of any broker or salesman."

In view of that judgment and our findings, we therefore conclude that the past conduct only of those officers and directors mentioned above of both applicant corporations affords us reasonable grounds for belief that these businesses will not be carried on in accordance with law and with integrity and honesty."

The Registrar in his reasons and decision, said:

" In writing this decision, I am forced to take into consideration that the leasing company was operated by the same person who subsequently operated CAMP CARS LIMITED, and that this person, Mr. Grover Camp Robertson, had been, until this investigation revealed otherwise, a highly respected and reputable member of the automobile retail industry, and the public had every reason to believe that the number of years that he had been in business was an indication that they could rely upon his honesty and integrity in their dealings with him, and he has, by his actions, which in my opinion are fully proven, grossly abused this trust. The public has every right to believe that persons in the automobile retail industry will deal with them in good faith, and the disclosure of the unlawful acts committed by this company over a period of more than one year, is a matter of grave concern to the Ministry that is charged with protecting

the public through the supervision and control exercised through the Statute that was legislated for the public protection, and it is for this reason, and those disclosed above, that I consider that I have no alternative but to propose the revocation of the certificates of registration of CROSS-CANADA CAR LEASING LIMITED, and that of CAMP CARS LIMITED."

Mr. Maloney relied strongly on the judgment of Arnup, J.A. for the Court of Appeal in Re Registrar of Used Car Dealers and Salesmen and Robert Rowe Motors Ltd. et al.; [1973] 1 O.R. 308 (C.A.), where the Court on a similar appeal, increased probation to a suspension of three months, and would have made six months had the appeal been brought properly forward. This, said Mr. Maloney, in effect established the type of discipline appropriate to the offence, and should guide those below and this Court in considering this matter.

We are indeed guided by it, but I do not think that it establishes a tariff for like offences.

I am of opinion that the Registrar and the Commercial Registration Appeal Tribunal, who are entrusted with the discretionary power, have not exercised it on any wrong principle, but have given weight to the public interest involved, and the necessity to make it patent to all that the public will be protected, so far as their discretion permits, against agreed and consistent fraud of the kind practised here. Not only the appellants but all engaged in this business must realize that they can only do so if they act honestly and fairly.

I would dismiss the application, with costs.

July 9, 1973

IN THE SUPREME COURT OF ONTARIO
Divisional Court

Wells, C.J.H.C., Wright, J., and Holland, J.

IN THE MATTER OF The Motor Vehicle)	
Dealers Act, (Formerly The Used)	A. Maloney, Q.C. and
Car Dealers Act) R.S.O., 1970,)	<u>D. O'Connor</u>
Chapter 475, as amended;)	for applicant
)	
AND IN THE MATTER OF CAMP CARS)	
LIMITED and CROSS-CANADA CAR)	C. Powell and
LEASING LIMITED,)	<u>E. Then</u>
Applicants)	for respondent
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN,)	
Respondent)	<u>Heard: June 29, 1973.</u>

HOLLAND, J. (Dissent):

This is an appeal from an order of The Commercial Registration Appeal Tribunal, dated January 26th, 1973, wherein the registration of Cross-Canada Car Leasing Limited as a motor vehicle dealer was revoked. The decision was attacked on two grounds:-

- (a) That the Commercial Registration Appeal Tribunal and the Registrar of Motor Vehicles had no jurisdiction in that Cross-Canada Car Leasing Limited was not subject to the provisions of The Motor Vehicle Dealers Act, R.S.O. 1970, Ch.475;
- (b) that the order revoking the said registration in all the circumstances was an excessive penalty.

The facts are not in dispute. The hearing before the Commercial Registration Appeal Tribunal, hereinafter called the Tribunal, disclosed that the appellant was incorporated on October 23rd, 1952, and had been engaged since that time in the business of long term vehicle leasing. The appellant applied and became registered under The Used Car Dealers Act, R.S.O. 1970, Ch.475 (the predecessor to The Motor Vehicle Dealers Act). The appellant disposed of returned leased vehicles primarily through automobile auctions or by sales to motor vehicle dealers. During the period from January 1st, 1971 to June 30th, 1972, odometers indicating the number of miles a vehicle had travelled were rolled back on 120

returned leased vehicles, totalling approximately 1,600,000 miles. This number of vehicles apparently constituted a relatively small percentage of the total number of vehicles sold by the appellant during the period. The fact that odometers were being rolled back on returned leased vehicles was known by the President and General Manager of the appellant. Subsequent to the investigation by the Registrar of Motor Vehicle Dealers and Salesmen the appellant made adjustments with purchasers who complained of roll backs. Apparently no effort was made to make adjustments with those purchasers who made no such complaint. No odometers were rolled back by or on behalf of the appellant after the investigation was commenced in July of 1972.

The appellant carries on a leasing business across Canada, owns a two storey building in Scarborough, at the time of the hearing had on lease approximately 1,520 vehicles, employs some 39 people, 27 of whom are employed in Ontario, had a gross annual income of approximately \$3,000,000.00 and a net worth estimated at \$1,300,000.00.

Prior to the hearing before the Tribunal, the appellant moved before this Court for a declaration that it was not a motor vehicle dealer carrying on the business of buying and selling motor vehicles and was therefore not required to be licensed under the provisions of the Motor Vehicle Dealers Act. That application was dismissed by a judgment of this Court dated January 8th, 1973. Reasons for judgment were delivered by Mr. Justice Wilson on behalf of the Court. These reasons read, in part, as follows: -

" The applicant company has been registered under the Act for many years. It has, up to now, notwithstanding its present contention that it is not subject to The Motor Vehicles Dealers Act, continued to be registered. It could have requested cancellation, which is provided for in Section 6(2) of the Act:

' . . . the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering his registration.'

We are of the opinion that in the circumstances and at the present time the applicant cannot say it is not subject to the Act and the application should be dismissed."

It was conceded before this Court that there had been no change in circumstances. This Court having once decided the matter, the question should not be further canvassed. It is, of course, open to the appellant to raise the matter afresh before another Court.

The real question before the Court was whether the revocation of the registration was too severe a penalty in all the circumstances.

It is necessary to consider certain provisions of The Motor Vehicle Dealers Act, of the Regulations passed thereunder and of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, Ch.113, as amended by Statutes of Ontario, 1971, Ch.50.

The following are the relevant sections of The Motor Vehicle Dealers Act:-

"5. (1). An applicant is entitled to registration or renewal of registration by the Registrar except where,

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

. . .

6. (2). Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration.

7. (1). Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal,

together with written reasons therefore, on the applicant or registrant.

(2). A notice under subsection 1 shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection 1 is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

. . .

(4). Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

. . .

33. (1). Every person who, knowingly,

. . .

(c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both.

(2). Where a corporation is convicted of an offence under subsection 1, the maximum penalty that may be imposed upon the corporation is \$25,000 and not as provided therein."

Regulation 19 (1) reads:-

"19.(1). Subject to subsection 2, a motor vehicle dealer shall not alter or permit any alteration to the odometer reading on any motor vehicle in his possession, nor shall he aid or abet any other person to make any alteration to the odometer reading of a motor vehicle that is the subject matter of a trade."

Section 9b, subsections (1) and (4) of The Ministry of Consumer and Commercial Relations Act, read as follows:-

9b. (1). Any party to proceedings before the Tribunal may appeal from its decision or order to the Supreme Court in accordance with the rules of court.

. . . .

(4). An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer that matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper."

The appellants requested a hearing before the Tribunal and the findings of that Tribunal are summarized in the reasons for judgment of my brother Wright.

The Tribunal reached the following conclusion:-

" In view of that judgment (Re Securities Act and Morton, [1946] O.R. 492) and our findings, we therefore conclude that the past conduct only of those officers and directors mentioned above of both applicant corporations affords us reasonable grounds for belief that these businesses will not be carried on in accordance with law and with integrity and honesty."

In making this finding the Tribunal obviously was trying to bring its decision within section 5(1)(c)(ii) of The Motor Vehicle Dealers Act.

I doubt that the conduct of the officers of the appellant in knowingly permitting the rolling back of odometers in the past

would indicate that such conduct will take place in the future. Frankly, I would think that, having been caught once, the officers and directors of the corporation would make every effort to see that such conduct is not repeated.

It appears clear to me that the purpose of the sections of The Motor Vehicle Dealers Act, above referred to, is to protect the public from dishonest motor vehicle dealers. This protection, I suppose, is accomplished in two ways:-

- (1). By preventing the dishonest dealer from carrying on business, and
- (2). by deterring potentially dishonest dealers by reason of the fear of suspension or revocation of registration.

One must bear in mind that suspension or revocation of registration, in addition to protecting the public, is, in itself, a very substantial penalty. One must also bear in mind that insofar as penalty is concerned proceedings may be taken under the provisions of section 33 of The Motor Vehicle Dealers Act and following conviction this appellant was subject to a maximum penalty of \$25,000.00. Apparently no proceedings were brought against the appellant under that section of the Act.

The discretion in the Divisional Court, under section 9b (4) of The Ministry of Consumer and Commercial Relations Act, is extremely wide, and appears to me to be wider than the powers of the Court of Appeal under section 19(3) of The Used Car Dealers Act, which section was repealed by Statutes of Ontario, 1971, Ch.50, section 85(2). In Re Registrar of Used Car Dealers and Salesmen and Robert Rowe Motors Ltd. et al. [1973] 1 O.R. 308, the Court of Appeal, in a case very similar in its facts to the present case, substituted for a penalty of "probation" an order that the registration be suspended for a period of three months. The Court indicated that, had the appeal come on earlier, it would have substituted an order of suspension for six months.

In this case consideration should be given to the previous good character of the principal officer and shareholders of the appellant, to the financial hardship resulting from the order, to the consequences of revocation, insofar as employees and customers of the appellant are concerned, and to the conduct of the appellant subsequent to the investigation.

In my view, revocation of registration, which is in effect the maximum penalty that can be imposed, was, in the circumstances, an excessive penalty and I would have substituted an order that the registration of the appellant be suspended for a period of nine months.

RELEASED: July 9, 1973

(Signed) R. G. Holland, J.

IN THE SUPREME COURT OF ONTARIO
COURT OF APPEAL

Schroeder, Martin and Houlden, JJ.A.

IN THE MATTER OF The Judicial)
Review Procedure Act, 1971)
S.O. 1971, Chapter 48;)

AND IN THE MATTER OF The)
Judicature Act, R.S.O. 1970)
Chapter 228, Section 36;)

AND IN THE MATTER OF The)
Motor Vehicle Dealers Act.)
R.S.O. 1970, Chapter 475;)

B E T W E E N:)

CAMP CARS LIMITED and CROSS-)
CANADA CAR LEASING LIMITED)

Applicants)
(Appellants))

- and -)

THE REGISTRAR OF MOTOR VEHICLE)
DEALERS AND SALESMEN)

Respondent)
(Respondent))

A. Maloney, Q.C. for the
Applicants (Appellants)

E. Then for the Respondent
(Respondent)

Appeal heard:
May 27, 1975

SCHROEDER, J.A. (Orally):-

On February 5, 1974, this Court made an order granting leave to the appellants to appeal on the question as to whether in the circumstances disclosed in evidence, Cross-Canada Car Leasing Limited was subject to the provisions of The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475.

It will not be necessary to set out the facts of the case which have been fully canvassed before us and are set out in great detail in the memoranda of points of fact and law and the other material filed herein.

We are all agreed that the appeal fails and should be dismissed. The appellant chose to apply for registration under the provisions of The Motor Vehicle Dealers Act as far back as 1965 and has renewed its application for registration annually since that time. The Divisional Court decided in an earlier proceeding by judgment delivered on December 18, 1972, that, in the circumstances of the then "present case", the appellant company was subject to the provisions of the Act. Entirely aside from the fact that no appeal was taken from that judgment we entirely agree that viewed in the light of the facts disclosed in the present proceedings, that decision was free from error.

The appeal therefore fails and will be dismissed with costs.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

REID, SAUNDERS and CAMPBELL, JJ.

B E T W E E N:

GORDON DOUGLAS COATES,
CENTENNIAL PLYMOUTH CHRYSLER
(1973) LTD. and D. BROWN
MOTORS (BARRIE) LTD.

Appellants

- and -

THE REGISTRAR OF MOTOR VEHICLE
DEALERS AND SALESMEN

Respondent

Robert J. Carter, O.C. for
the appellants

Kim Twohig for the
respondent

Heard:
March 4, 1988

REID, J. :

This is an appeal against an order of the Commercial Registration Appeal Tribunal released June 12, 1986, directing the Registrar of Motor Vehicle Dealers and Salesmen (the Registrar) to carry out his proposal to revoke the registration of Centennial and Brown as motor vehicle dealers and Coates as a motor vehicle salesman under the Motor Vehicle Dealers Act, R.S.O. 1980, c.299 (the Act).

The appeal is brought pursuant to s.11(1) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980 c.274, which confers wide powers on this court. It reads:

(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Gordon Coates is the sole shareholder and President of Centennial. Centennial is the largest Chrysler dealership in the Barrie area, and employs approximately 60 people. Coates is an officer and shareholder of Brown. Coates, Centennial and Brown all hold Class D. licences under the Motor Vehicle Dealers Act, entitling them to buy and sell cars.

Coates and Centennial were the subject of two allegations of fraud under the Criminal Code of Canada s.338(1) and 13 counts of odometer tampering under the Weights and Measures Act relating to the time period 1979-1982. Centennial and two other companies Coates controlled had been convicted in 1982 of failing to record odometer readings on the sale of motor vehicles contrary to regulations under the Act.

On September 9, 1985, Centennial pleaded guilty to the 13 counts of odometer tampering and two counts of fraud. All charges against Coates personally were withdrawn. No allegation of personal involvement in, or personal knowledge by Coates of Centennial's wrongdoing was alleged by the Crown Attorney on the pleas of guilty.

On October 11, 1985, the Registrar gave notice of his intention to revoke the Class D. licences of all of the appellants. The appellants required, as is their right, that a hearing take place before the Commercial Registration Appeal Tribunal pursuant to s.7(2) of the Act. The hearing took place on December 3 and 4, 1985, with submissions on March 13, 1986. The Tribunal's decision, released on June 12, 1986, was to order the Registrar to carry out his proposal and revoke the registrations of the appellants forthwith. On June 13th, this appeal was launched. On June 18th a stay of its decision was granted by the Tribunal.

The Revocation of Coates' Registration

The principal reason the Tribunal gave for revoking Coates' registration was that Centennial's convictions constituted prima facie evidence supporting a presumption that Coates was personally involved in the acts constituting Centennial's wrongdoing because he was in control of Centennial. This was made clear in the Tribunal's reasons, which opened with the words:

The evidence presented at this hearing has completely satisfied the Tribunal that the convictions referred to above were justly and properly entered against Centennial Plymouth Chrysler (1973) Ltd. and that the wrongdoing

in question was sufficient in nature and quality to justify the Registrar's Proposal in respect to that Applicant or any other applicant guilty or responsible for such wrongdoing. [Emphasis added.]

Later, at p.6 the Tribunal states:

Odometer spinning, like other dangerous practices, is rarely done in the present of onlookers, but, to the contrary, we understand it is done behind closed curtains. However, when it is discovered and proven, we may take judicial notice that somebody or other is responsible; not just a corporate entity but an actual person because a corporate entity, for all its extraordinary powers, cannot physically spin an odometer any more than it can get into a number of other kinds of trouble.

When a corporation pleads guilty to that offence, the matter does not end there so far as this Tribunal is concerned. We are willing, ready and able to presume that in the case of a closely-held and controlled corporation, something which has been proven in our view of this case to have been nothing less than (sic) an alter ego of Mr. Coates, a guilty plea of the fraud and crime of odometer tampering is prima facie evidence that the authorship of that wrongdoing was that of the person or persons in control of that corporation. We welcome the opportunity to establish this principal (sic) if it has not been put on record before, and if we are wrong, we would be glad of the opportunity of having the error corrected.

One can easily think of cases where a corporation, especially a large corporation with many shareholders, could be convicted of serious consumer or criminal offences without there having been any knowledge or guilt of wrongdoing by the shareholders or even some or all of the directors. But in a case such as this, where very close control and beneficial

ownership were entirely vested in one man, we would have to see evidence that that person, the person in charge was not involved in the established wrong-doing and in this case no such evidence was offered. We are not making a presumption of "guilty until proven innocent". But we are making a presumption that the person in charge was also informed, aware and/or responsible for what was going on. [Emphasis added.]

The Tribunal thus presumed that Centennial's corporate conviction proved the personal wrongdoing of Coates. There is no basis for this presumption anywhere in the Motor Vehicles Act, or in any principle of evidence.

A limited company may be convicted of an offence even though its officers and directors know nothing of its wrongdoing: R. v. Waterloo Mercury Sales Ltd. (1974), 18 C.C.C. (2d) 248 (Alta. Dist. Ct) at pp.254-5; Canadian Dredge and Dock Co. Ltd. v The Queen (1985), 19 C.C.C. (3d) 1 (S.C.C.).

It was thus possible for Centennial, which employed 60 people, to be convicted under the Weights and Measures Act with no wrongdoing at all by Coates. Coates was never convicted and the conviction of Centennial provides no basis for presuming his guilt.

There was evidence that Coates controlled Centennial, but no evidence implicating him personally in the wrongful acts to which Centennial pleaded guilty. Had the Tribunal examined evidence of the nature and quality of Coates' operational control, and had it applied the proper standard of proof referred to below, it would have had to decide whether or not there was clear and convincing proof based upon cogent evidence that Coates was personally involved in the wrongdoing of Centennial.

Regrettably, the Tribunal never asked itself that question. It proceeded instead on a wrong basis. Instead of considering whether there was evidence of wrongdoing by Coates, it dispensed with proof of wrongdoing by relying on a non-existent presumption of law and explicitly invited the opportunity to have its error corrected.

The passage quoted from the Tribunal's reasons might have been appropriate if the Tribunal had been dealing with the Weights and Measures Act, S.C. 1970-71, c.36, which contains the following provision:

37. (1) In any prosecution for an offence under this Act it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused whether or not the employee or agent is identified or has been prosecuted for the offence, unless the accused establishes that the offence was committed without his knowledge or consent and that he exercised all due diligence to prevent its commission.

There is no such provision in the Motor Vehicle Dealers Act.

This misconception existed from the outset of the hearing before the Tribunal and appears to have affected the course of evidence. The Chairman, Matthew Sheard Q.C., expressed the opinion that no more than proof of the conviction of Centennial was necessary to establish a prima facie case against the registrants. That created a regrettable appearance of judgment before evidence and without deliberation. But beyond that, it might have deprived the Tribunal of the opportunity of hearing evidence supporting a presumption implicating Coates.

At Vol. 1, p.6, of the transcript of evidence, this occurs (Mr. Martin is counsel for the Registrar):

Mr. Chairman: Mr. Martin, the allegations contained in the Notice of Proposal and in the supplementary Notice of Further Particulars are very weighty and, if supported, as seldom seen to be by records of conviction, would constitute a strong prima facie case. I think in the interest of brevity and the interests of efficiency, and the interests of economy it really will not be necessary for you to prove, in complete detail, all the allegations set out because you have a strong prima facie case. In the opinion of the chair, it would be adequate for you to dispense, if you in your untrammelled discretion consider it appropriate, dispense with a great deal of this material. I think you've got some very, very strong evidence which, if it could be substantiated by means of certificates of conviction and so on ought really to be adequate for your purpose. The Tribunal sees no advantage to multiplicity of proceedings

when that is unnecessary. Will you bear my remarks in mind as you present your evidence and put in your case?

and at p.7:

Mr. Chairman: The Registrar says, "The company was convicted on thirteen counts", and five, "With respect to vehicles shown as numbers ten and eleven, the company was convicted of fraud under the Criminal Code". All right, well now, it seems to be that if you can demonstrate those thirteen convictions under the Weights and Measures Act and the two convictions under the Criminal Code, you'll have substantially demonstrated your case, subject, of course, to the rebuttal.

and at p.8:

Mr. Chairman: All right, well, just to recapitulate my remarks, I think you have a very strong prima facie case. I'd stick to the most serious parts of it, and I think in that way we'll get where we're going faster.

and at p.63:

Mr. Chairman: Just one minute before you proceed with these Mr. Martin. My colleagues and I would like to cast our eyes and briefly go over this Exhibit. Just as I anticipated, it does, of course, contain the full 27...

Mr. Martin: Fifty seven.

Mr. Chairman: ...transactions. Now, I hope you do not consider it incumbent upon you, in order to establish the Registrar's case, to take us through each and every one of these transactions in minute detail, thereby opening the necessity for your learned friend to cross examine on them. I think that you can dance through this field just stopping here and there in order to accomplish your purpose.

Mr. Chairman: I hope that you're going to be selective in an enlightened way because you don't really have to use, you don't have to overprove your case, you know, that's never necessary.

Thus, because of his erroneous view that proof of the company's conviction raised a presumption of Coates' built, the Chairman took over the conduct of the hearing and directed Mr. Martin to the effect that he need only prove the convictions in order to prove his case. In other words, proof of the convictions placed Coates in a position where he had to prove, as in a prosecution under the Weights and Measures Act, that he was unaware of the wrongful acts of another or others in the company. Had the Chairman's view not been held so strongly the course of evidence might have been different. If counsel for the Registrar had offered evidence that bore on the issue of Coates' knowledge of or participation in the company's wrongful acts, it might have been open to the Tribunal to draw an inference that Coates was culpable. But no such evidence was offered in light of the chairman's direction. The Tribunal thus deprived itself of the opportunity of making that finding by making it clear that evidence to that effect was neither necessary nor welcome.

There was, in the result, no basis in law or fact for the revocation of Coates' registration and it must be set aside.

The Revocation of Centennial's and Brown's Registration

This is attacked on a different ground. The revocations rest on s.5(1)(b) of the Act, which reads:

5 (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or

- (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The argument was made to the Tribunal by Mr. Carter that because s.5(1)(c) explicitly referred to corporations, that subsection alone applied to the situation of the corporations. It was submitted that the registration was a right, akin to a property right, and that registrants were entitled to a strict interpretation of legislation providing for an interference with that right by revocation of an existing registration.

The submission depends upon a careful reading of s.5. It is that since s-s.5(c) refers exclusively to corporate applicants, s-ss.5(1)(a) and (b) could not operate in respect of a corporation. Thus the corporation's convictions could not affect its registration by virtue of those subsections. Only the past conduct of the corporation's officers or directors could disentitle a corporation to registration. In the absence of the presumption implicating Coates, there is no evidence of misconduct on the part of the officers or directors of Centennial.

This submission was the subject of a lengthy exchange between Mr. Carter and the chairman. That the Chairman grasped the point clearly is shown by the following, taken from Vol. 2, pp.80-81 of the transcript:

Mr. Carter: I think I have. Now, I'll come back to (b)(1). Again, in my submission, the only evidence as to the activities that were the subject matter of the proceedings of

November of '82 were pleas of guilty by the limited company -- to charges under the Motor Vehicle Dealers Act. I stressed: "by the limited company."

So, the admission by the company and the conviction of the company cannot reflect past conduct of Mr. Coates. Similarly ---

The Chairman: They don't reflect the past conduct of Mr. Coates, in themselves, but, it seems to me, that we have the ability to look into the facts as alleged in the charges which would be, as it were, admitted to by reason of the pleas of guilty.

Mr. Carter: By the company.

The Chairman: By the company. Now, a plea of guilty and an admission of the charges by the company, I presume, you would like us to believe, is not an admission of Mr. Coates or any other person of whom exceptional conduct - - with whom exceptionable conduct is alleged?

Mr. Carter: That's correct.

That submission was rejected. The Tribunal said, at p.5 of its reasons:

In the course of final submission counsel for the applicants put forward the argument that the aforesaid convictions of the corporate entity Centennial Plymouth Chrysler (1973) Ltd. did not affect its entitlement to registration under a precise interpretation of section 5 of the Act. He argued that subsections 5(1)(a) and (b) referred not to corporate applicants but only to applicants who were persons. Corporate applicants were referred to in subsection 5(1)(c). That is to say, subsections 5(1)(a) and (b) refer exclusively to personal applicants; subsection 5(1)(c) exclusively to corporate applicants. Therefore, since subsections 5(1)(a) and (b) could not operate in respect to a corporation, the convictions registered against Centennial

Plymouth Chrysler (1973) Ltd. had no relevance and could not affect that Corporation's entitlement to registration under the Act. Only if the past conduct of its officers or directors afforded reasonable grounds for belief that its business would not be carried on in accordance with law and with integrity and honesty could it be disentitled under the subsection which dealt with corporation, namely, subsection 5(1)(c). But Mr. Coates, who at all material times was and is the President, Director and sole shareholder of the Company, was not convicted of the consumer related charges to which the corporate applicant, his Company, pleaded guilty and was convicted.

The Crown withdrew its charges against Mr. Coates at or about the same time as his Company entered the guilty pleas and, therefore, the Judge had no option or opportunity to convict him. Similarly, the third applicant was unaffected, so ran the argument.

The Tribunal has pondered these ingenious notions at length and not without a degree of relish for their subtlety. But in the end, it rejects them,

To reject the submission is, of course, to reject the plain words of the statute, in favour of one that would permit the Tribunal to fulfil its duty as it saw it. The Tribunal characterized the appellants as dishonest, greedy and compulsive cheats. The following passage (from p.8 of its reasons) reveals the strength of the Tribunal's conviction that the appellants' registrations must be revoked:

During the presentation of evidence for the applicants on the first day of the hearing, the Tribunal heard the testimony of a Mr. K. Arnold, who is Branch Manager of Chrysler Credit Canada Ltd., and he brought a letter beginning "To Whom It May Concern" from a Mr. W. R. Bradley who is the Vice-President of Chrysler Credit Canada Ltd. It seems that Mr. Coates' operations involve up to ten million

dollars in credit being made available to him by Chrysler Credit and both Mr. Arnold and Mr. Bradley appear to have a high opinion of Mr. Coates and Centennial Plymouth Chrysler (1973) Ltd. and would like to see his and his Companies' registrations continued. That is because they are "efficient" and very profitable. But efficient and profitable operations which are also dishonest are not in the public interest which it is our duty to protect. When asked if he understood the word "condonation" or "condone", Mr. Arnold suggested they meant something like "we can live with it".

Odometer altering designed to bilk the public into paying more for an expensive product like a used motor car than it is worth is not something that the Registrar of Motor Vehicle Dealers and Salesmen is prepared to live with and neither is this Tribunal.

The fact that Mr. Coates' operation has been efficient and profitable must draw us to the conclusion that the fraudulent misdeeds were unnecessary to ensure the success or survival of his business but were simply motivated by greed and some compulsion to cheat. In our view, greedy and compulsive cheats are the worst kind.

In revoking a registration, the Tribunal is interfering with a right to make a living that has been equated to a property right: see Evans et al. Administrative Law (2nd Ed.) Emond Montgomery Publication, Toronto 1984 at p.80. While the grant or refusal of a licence may be regulated as a matter of privilege, rather than right, the revocation of an existing licence has always been regarded as an interference with a right, not a privilege.

Appellants are thus entitled to a plain reading of the Act; it is not even necessary to insist on a "strict" reading, for it is not ambiguous: see Re: Don Howson and Registrar of Motor Vehicle Dealers (1974), 6 O.R. (2d 39 (div.Ct)). The plain meaning of s.5 is that a non-corporate applicant is subject to ss.5(1)(a) and (b) and a corporate applicant is subject to s.5(1)(c). The past conduct of officers and directors alone is relevant to the grant or continuance of a corporation's registration. Why the

Legislature saw fit not to include reference to the past conduct of a corporation is not clear. What is clear is that a statute affecting livelihood must not be warped to fit the objectives of an administrative tribunal however laudable they might be.

The read "applicant" in s.5(1) to include corporation is to ignore the distinction the statute itself draws. It is a reading that, in my respectful opinion, is unacceptable.

There was no past conduct of any officer or director of Centennial or Brown that could be used as a basis for revoking the registration of the companies, and the Centennial convictions in 1982 and 1985 were nil ad rem. The order of the Tribunal revoking their registration must be set aside.

The Standard of Proof

In apparent justification of its adoption of the presumptions, the Tribunal set out its understanding of its governing standard of proof. It said, on p.7 of its reasons:

The standard of proof required before this Tribunal can reach a decision is not that of criminal law but is that arising from the Tribunal's jurisdiction which in turn is to be determined from the Act under which this Proposal was brought, as well, inter alia, as the Ministry of Consumer and Commercial Relations Act, the Statutory Powers Procedure Act and as we are assured, section 10 of the Interpretation Act. The legislation under which it is proposed to revoke the applicants' registrations is consumer legislation designed to protect the public. It is not meant to punish but to protect. To that end, the Tribunal has no hesitation in stripping all three of these registrants of their respective registrations and thereby of their ability to do further harm to innocent individuals who venture into the market place.

While this passage is somewhat lacking in clarity it appears to suggest, in its context, that the standard is low enough to justify the adoption of presumptions otherwise unknown to the law. In other words, in order to perform its duty to protect the public, the Tribunal is justified in presuming that persons in control of corporations are the authors of the corporations'

wrongdoing, notwithstanding that the existence of such a presumption might be questionable. That erroneous view might have been the source of the Tribunal's errors in this case. The governing standard of proof is that proclaimed by the Divisional Court in 1977 in re Bernstein and the College of Physicians and Surgeons of Ontario (1977), 15 O.R. 447. While the members of the court used different words to express it, they laid down a standard in unmistakable terms, a standard that was appropriate to the gravity of the charge. Thus, O'Leary J., speaking for himself and Steele J. said (at p.470):

In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities". By referring to the decisions of several distinguished jurists I hope I have made it easier for them to understand the kind of proof required before a conviction can be entered in a particular case. The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.

In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.

The grave charge against Dr. Bernstein could not be established to the reasonable satisfaction of the Committee by fragile or suspect testimony. The evidence to establish the charge had to be of such quality and quantity as to lead the Committee acting with care and caution to the fair and reasonable conclusion that he was guilty of the charge. In this case where Dr. Bernstein, a man of

good reputation swore that no impropriety occurred between himself and Jo-Anne Johnston it would take very strong evidence to destroy his defence of his reputation.

In my view, the evidence in support of the charge was not sufficiently cogent to permit the Discipline Committee to make the finding it did and that finding must be set aside.

Garrett J. said, (on pp.485-6):

I hold that the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based upon cogent evidence which is accepted by the tribunal. I agree with Mr. Justice Schroeder that the burden of proof is to establish the guilt of the doctor charged by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon the balance of probabilities. I think, however, that the seriousness of the charge is to be considered by the tribunal in its approach to the care it must take in deciding a case which might in fact amount to a sentence of professional death against a doctor. I am not prepared to hold that even though this is a sexual case that corroboration was required although I do think that the complete absence of any evidence at all confirming the complainant's evidence is a serious factor for the tribunal to consider and I would think that it would be only in the rarest cases that a finding of guilt would be made in these circumstances.

This message is clear and has been consistently adopted by this court. Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a licence to practice medicine or to gain a livelihood in business.

The concept that the standard of proof rises with the gravity of the allegation and the seriousness of the consequences has been reaffirmed in the recent decision of the Supreme Court of

Canada in R. v. Oakes, [1986] 1 S.C.R. 137. There, Chief Justice Dickson said, at p.137:

... Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974), at p.385. As Lord Denning explained in Bater v. Bater, [1950] All E.R. 458 (C.A.), at p.459:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

This passage was cited with approval in Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154, at p.161. A similar approach was put forward by Cartwright J. in Smith v. Smith, [1952] 2 S.C.R. 312, at pp.331-32:

I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences...

Whatever the Tribunal might have meant by its reference to the standard of proof arising from its jurisdiction, it does not appear to reflect a consciousness of the standard laid down in Bernstein. Indeed, it suggests the opposite. I think it is seriously wrong and that this error also affected the entire proceeding.

There is one further matter that deserves comment; that is costs. The scornful tone adopted by the Tribunal in rejecting one of Mr. Carter's submissions as "ingenious notions" they had "pondered at length and not without a degree of relish for their subtlety" is an example of the chairman's treatment of him. Two further passages from the transcript illustrate that (and, incidentally, the Chairman's erroneous view that the conviction of the company was evidence of Coates' guilt). Volume 1, p.92 reads, in part:

Mr. Carter: With respect to the two counts of fraud, which are referred to in counts as cars 10 and 11, it was made clear that the limited company was pleading guilty because it, through its salesmen, impliedly made representations to those two individuals which were not accurate, and it was on that basis, and that basis alone.

Mr. Chairman: Are you the lawyer who advised him to do this?

Mr. Carter: Am I the lawyer that advised the client?

Mr. Chairman: To enter a plea of guilty?

Mr. Carter: Yes, on that basis.

Mr. Chairman: I see.

Mr. Carter: Based on a judgment of ...

Mr. Chairman: Just prima facie I wouldn't say that was awfully good advice, because the conviction stands against a company with which Mr. Coates is very, very much involved, and it's a blot on his record.

In Vol. 1, pp.141-2:

Mr. Chairman (to Mr. Carter): And that's why we're here, it's for the sake of the witnesses. Anyway, let's continue, then, with this cross examination, perhaps we can look forward to hearing the end of it pretty soon.

A perusal of the transcript makes it clear that Mr. Carter did his best, with courtesy and skill, to get on with his task of representing his clients to the best of his ability despite these ill-chosen and unjustified comments.

If there were no other basis for an award of costs against the titular respondent, as representing the Tribunal, the foregoing would perhaps be sufficient. But it is unnecessary to rely on it. On the principal point in appeal, that of the presumption, the Tribunal expressly invited reversal, if wrong. Since it was wrong, it is only right that it, or its representative here, should pay the costs of this appeal.

As the matter was prejudged, there is no point in remitting it to the Tribunal for reconsideration. Considering the time that has passed -- approximately six years since the conduct complained of, it would not be fair to order a new hearing.

Thus, in my opinion, the appeal should be allowed, with costs, and the order of the Tribunal set aside.

Signed Reid

24 Aug. 88.

IN THE SUPREME COURT OF ONTARIOOsler, Reid and Robins, JJ.

IN THE MATTER OF THE MOTOR)	
VEHICLE DEALERS ACT, R.S.O. 1970,)	
Chapter 475, as amended;	)	<u>J.B. Johnson,</u>
	)	for the appellant
B E T W E E N:)	
)	
THE REGISTRAR OF MOTOR	)	<u>C.M. Rutter,</u>
VEHICLE DEALERS	)	for the respondents
)	
Appellant)	
)	
- and -)	
)	
WILLIAM CIURLUINI LTD.,)	
Operating as RELIABLE AUTO)	
SALES, and WILLIAM CIURLUINI)	
)	
Respondents	)	<u>Heard:</u> May 24, 1978

OSLER, J. (Orally:)

The Registrar of appeals from the order of the Commercial Registration Appeal Tribunal in which certain findings were made against William Ciurluini Ltd., operating as Reliable Auto Sales and against William Ciurluini with respect to the penalty imposed. The proposals of the Registrar who under the statute must take the initiative, dealt with an allegation that both the company and the individual had over an extended period of time rolled back odometers on motor vehicles coming into their possession for resale and that this had been done on a very extensive scale.

Evidence was placed before the Tribunal indicating that between March and December of 1975, approximately 109 vehicles were affected and that the rollbacks had averaged over 26,000 miles for a total of approximately 3,000,000. On p.6. of the reasons of the Tribunal, additional findings were made with respect to another group of motor vehicles totalling 34 with an average rollback of 26,108 miles for a total of 809,345 miles. That is in addition to the figures already indicated. In other words, the conduct complained of was extensive and the Tribunal was satisfied that such conduct had been established.

The Tribunal made a finding that the past conduct of the company and of Ciurluini afforded reasonable and probable grounds for belief that they would not carry on business in accordance with

law and with integrity and honesty. They then went on to express the opinion that because of the prior good conduct of Ciurluini, it was not a case for revocation of registrations but for a suspension of one month and the imposition of certain conditions thereafter.

The Registrar submits that in imposing such a light penalty, the Tribunal erred in principle in that it was so light as not to reflect the gravity of the conduct it had found and he submits further that in specifically finding that prior good conduct justified mitigation of what might have been a more serious penalty, the Tribunal ignored a prior conviction of the corporate applicant.

It was further submitted on behalf of the Registrar before this Court that the Board should have made a finding that, in effect, the principal business of the applicants before the Tribunal was that of altering odometers of cars intended for resale.

We are not prepared to infer that this was the main business of the persons before the Tribunal. The Tribunal made no such inference and despite the very broad powers given to this Court by s.9(4) of The Ministry of Consumers and Commercial Relations Act. R.S.O. 1970, c.113, as amended, we are not prepared to draw any such inference on the basis of any evidence drawn to our attention. However, the Board has found that the company persistently carried out these rollbacks; that Ciurluini was aware or should have been aware of them; that Ciurluini by not checking the bills against the actual odometer readings, aided and abetted the persons who physically carried out the rollbacks; and that Ciurluini was the sole active officer and director responsible for the day-to-day operation of the corporation and that he encouraged its salesman by allowing the dealership to be used by that person to foster his illegal activity. It further found that eventual purchasers were damnified, deceived and misled by the behaviour referred to. This conduct is serious and it reflects knowledgeable activity by Ciurluini which merits a serious penalty.

The Tribunal, no doubt from an unduly delicate regard to the fact that the prior conviction of the company was at that time under appeal, specifically refrained from considering that conviction in assessing its penalty and in fact referred to the prior good conduct of Ciurluini. No such inhibition should restrain this Court and the very broad powers to which I have referred, include the power to impose an appropriate penalty. We now know not only that there was a prior conviction, but that conviction was upheld on appeal. The conviction was against the corporation but the court found, in effect, that Ciurluini was the "alter ego" of that corporation.

We have no detailed knowledge of the standards acceptable in the industry or applied by the Tribunal which has a wide experience of such cases. We do feel, however, that in the words of Wright, J. in the case of Camp Cars Limited and Cross-Canada Car Leasing Limited v. The Registrar of Motor Vehicles Dealers and Salesmen (Div. Court, unreported judgement released July 9, 1973) that:

"...Not only the appellants but all engaged in this business must realize that they can only do so if they act honestly and fairly."

In our opinion, the public interest requires a more substantial penalty and in the circumstances, a penalty of six months' suspension will be imposed upon each of the corporation and William Ciurluini and in addition, the conditions found at p. 23 of the Tribunal's reason will also be imposed following any resumption of business that may be undertaken by these persons.

The appeal will be allowed with costs for the reasons given. There was also before us a cross-appeal which must, of course, be dismissed. There will be but one set of costs.

Released: May 26, 1978

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

WELLS, C.J.H.C., VAN CAMP and HENRY, JJ.

IN THE MATTER OF THE MOTOR	)	<u>T.H. Wickett</u>
VEHICLE DEALERS ACT, R.S.O.1970	)	for the Respondent
CHAPTER 475, AS AMENDED;	)	(Applicant)
)	
AND IN THE MATTER OF THE	)	<u>R.D. Allard</u>
JUDICIAL REVIEW PROCEDURE ACT,	)	for the Appellant
1971, S.O. CHAPTER 48;	)	(Respondent)
)	
AND IN THE MATTER OF;)	
)	
REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Appellant)	
(Respondent))	
)	
- and -)	
)	
CHARLES RONALD CLERMONT)	
)	
Respondent)	
(Applicant)	)	<u>Heard: December 2nd, 1974</u>
)	
)	

VAN CAMP, J. (Orally)

This is an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of The Commercial Registration Appeal Tribunal dated the 16th day of September, 1974 which ordered that the respondent be registered as a motor vehicle salesman subject to certain conditions.

The issue in this appeal is the interpretation of sec. 5(1) of The Motor Vehicle Dealers Act R.S.O. 1970 c. 475 as amended by 1971 Statutes of Ontario, Chapters 21 and 50 and 1972 Statutes of Ontario Chapter 1, sec. 47:

"5.--(1) An applicant is entitled to registration or renewal by the Registrar except where,

- (a) having regard to his financial position, the applicant cannot reasonably be

expected to be financially responsible in the conduct of his business; or

- (b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and integrity and honesty; or
- (d) the application is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations."

Particularly, we are concerned with the interpretation of the words "the past conduct of the applicant" in sec. 5(1) (b).

The facts before the Tribunal were admitted. The respondent was a registered real estate salesman from September 24, 1973 until March 25, 1974. Before registration, he had taken a 90 hour basic training course in which he should have received some instruction on the use of trust funds and on the drawing of an offer to purchase. During the period of registration, he had in fact negotiated two previous offers and had received assistance from his employer in the drafting of these offers. On February 15, 1974 he had negotiated and written up an offer to purchase for certain premises in which he did not set out the name of the real estate broker, his employer, he had the deposit made payable to himself and following the offer he deposited the funds in his own account. By reason of a typographical error the offer was open for acceptance for thirty days rather than two days. During this time, it was expected that the offer would be accepted at almost anytime and during this time nothing was done about the deposit. At the end of the thirty days the vendor had accepted another offer and the purchaser requested the return of the deposit. The respondent gave his cheque for \$5,000.00 which was returned marked N.S.F. He then gave the purchasers two further cheques dated five and seven

days after the request in the amounts of \$3,000.00 and \$2,000.00 respectively which were honoured. He lost his employment and his registration as a real estate agent lapsed by April 1, 1974.

On June 12, 1974, he applied for registration as a motor vehicle salesman. He attended at the office of the Registrar and in an interview with the Chief Inspector and one other, in the absence of the Registrar, gave the facts that I have outlined. The Registrar, under the Act, proposed to refuse to grant registration. As required notice was given of this proposal and the respondent requested a hearing before the Tribunal. The Tribunal after hearing the evidence submitted by the respondent and three other witnesses gave its decision in which it discussed in detail the evidence that had been given including the facts I have outlined above; it directed that the respondent be registered as a motor vehicle salesman subject until December 31, 1975 to certain conditions, the breaching of which would immediately result in the revocation of the registration.

The Tribunal interpreted the words "past conduct" as being "a course of past conduct rather than one isolated mistake, wilful though it was, particularly where the general public has not been harmed. The Tribunal will not in this instant case prevent the Applicant from earning a livelihood for himself and his dependent family in the motor vehicle industry if he so desires as we conclude from the character evidence that he is a man of hitherto good character."

We agree with the submission of appellant that the interpretation of the words "past conduct" by the Tribunal is not a principle or statement of law that should bind future tribunals. The past conduct referred to in sec. 5(1) of the Act may in certain circumstances consist of one isolated mistakes, if it is of such a nature and in circumstances that there are reasonable grounds for belief that the person applying to be registered would not carry on business in accordance with law and with integrity and honesty.

However, in the decision before us, it is obvious from a reading of the entire decision that the Tribunal was not attempting to lay down a general rule; rather, it was answering a question which was put before it, namely, whether this one instance of misconduct by one who was shown by the other evidence to have been of good character was sufficient in the circumstances.

The Tribunal had the advantage that we do not have of seeing the applicant personally, of being able to weigh the evidence that was given before it by witnesses who were personally called. The Tribunal had the advantage of cross-examination, it was able to ask questions that occurred to it. The words used by the Tribunal must

be read in the context of such evidence. We do not consider that this is an appeal in which we should override the decision of the Tribunal. There are certain facts which give some doubt; but when we consider that we do not have the advantage that the Tribunal has, we cannot find that the isolated facts should outweigh the character evidence and the evidence of the respondent which was before the Tribunal. It might be noted at this point, that this was the only occasion on which the applicant personally appeared before those who were to make a decision as to his future. The Registrar's proposed decision or proposal is made without a hearing and is a statement which is put before the Tribunal which holds the hearing.

Consequently, we confirm the decision of the Tribunal and we dismiss the appeal. Under the circumstances, there will be no order as to costs.

Released: December 16, 1974

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

HOULDEN, VAN CAMP and HENRY, JJ.

IN THE MATTER OF THE JUDICIAL REVIEW )	)	<u>L. T. Forbes</u>
REVIEW PROCEDURE ACT, STATUTES OF )	)	for the Applicants
OF ONTARIO, 1971, CHAPTER 48;))	
AND IN THE MATTER OF THE STATUTORY )	)	<u>R. Lundy</u>
POWERS PROCEDURE ACT, STATUTES OF )	)	for the Respondents
ONTARIO, 1971, CHAPTER 47;))	
AND IN THE MATTER OF THE MOTOR))	
VEHICLE DEALERS ACT, R.S.O., 1970,))	
CHAPTER 475 AS AMENDED:))	
AND IN THE MATTER OF THE MINISTRY OF))	
CONSUMER AND COMMERCIAL RELATIONS))	
ACT, R.S.O. 1970, CHAPTER 113;))	
B E T W E E N))	
DABOR MOTORS LIMITED and))	
RONALD W. DABOR))	
Applicants))	
- and -))	
R.G. MacCORMAC, REGISTRAR OF MOTOR))	
VEHICLE DEALERS AND SALESMEN,))	
and THE COMMERCIAL REGISTRATION))	
APPEAL TRIBUNAL))	
Respondents )	)	<u>Heard: October 24th, 1974</u>

HENRY, J. (Orally)

This is an application for judicial review of the proposed decision of the respondent Registrar of Motor Vehicle Dealers and Salesmen dated May 9, 1974 to suspend the applicants' registration for orders by way of declaration and in the nature of certiorari and prohibition quashing the said proposed decision and prohibiting the respondent, The Commercial Registration Appeal Tribunal from entering upon a hearing or enquiry with respect to the proposed decision.

The applicants are respectively a motor vehicle dealer (the Corporation) and a salesman (the individual) who are registered as such pursuant to The Motor Vehicle Dealers Act R.S.O. 1970 c. 475 as amended.

The simple issue before us, as was explained by Mr. Forbes on behalf of the applicants, is that in making his proposed decision, the rules of natural justice were not observed by the Registrar in that he did not give notice to the applicants that he was considering the possibility of the suspension of their right to carry on business under the Act and gave them no opportunity to be heard while he was considering his disposition of the matter.

There is no issue on the evidence as to the proposed decision having been made and notice of that proposal having been given to the applicants; it is also common ground that the applicants were not given notice and an opportunity to be heard before the Registrar.

Mr. Forbes very carefully outlined in argument the history of the applicable sections in this legislation and particularly the amendments to the significant sections which are sections 5, 6 and 7 in 1972. But I say at once that while we are grateful to have this information, in our view, the changes made in 1972 do not have any bearing on our decision.

The statute, which since the amendments of 1972 relates to dealers of both used and new motor vehicles, sets up a scheme whereby a dealer or a salesman carrying on business by trading in motor vehicles must be registered before he may do so. The sections with which we are concerned are sections 5, 6 and 7. Section 5 sets out the circumstances in which a person is entitled to registration or renewal of registration by the Registrar who is the official set up by the statute to administer these provisions. The statute gives an applicant entitlement to be registered unless certain conditions exist which may be described as adverse to him. One of these, found in section 5(1)(b), which would disentitle an applicant to registration, is that the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Paragraph (c) makes a similar provision disintitling to registration in the case of a corporation where the past conduct of officers or directors is of similar kind.

Section 6 then deals with the power of the Registrar to refuse to register an applicant where the applicant is disintitled under the provisions I have just mentioned. Section 6(2) then provides:

" (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the

registrant is in breach of a term or condition of the registration."

This is the provision with which we are concerned because the applicants before us are in the position where it is proposed to suspend their registration.

Section 7 then provides in part:

"7.--(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection 1 shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection 1 is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection 2, the Registrar may carry out the proposal stated in his notice under subsection 1.

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(7) Notwithstanding subsection 1, the Registrar may cancel a registration upon the request in writing of the registrant in the prescribed form surrendering his registration."

These provisions differing from the former state of the Act quite clearly provide a scheme in which the Registrar in administering the Act has some power with respect to the suspension or revocation of registration. A complete scheme is set up by the statute which creates the proper framework in which the rules of natural justice are to be observed. In the first place, where the Registrar proposes to suspend a registration, he is required to serve notice of his proposal together with written reasons therefor on the applicant or registrant. Here at once is provided in the statute the principle that a person against whom action is to be taken affecting his rights or privileges is to have notice of the intended action. By requiring written reasons, the legislature clearly intends that at this stage the Registrar shall state to the registrant what the case is that he has to meet in the view of the Registrar.

It is to be noted that the Registrar has not made a decision. He has made no order and he has made no determination. What he does under section 7(1) is to frame a proposal to suspend or revoke a registration. That proposal has no effect and it cannot have an effect under the statute until other circumstances take place.

Setting aside the fact that a registrant having received the notice may decide not to request a hearing, in which case the Registrar's proposal will ultimately take effect, the statute then provides for the second important principle of natural justice, namely, the machinery whereby the registrant may have a hearing. At this stage therefore, once he has received the notice, he has had notice and is by the statute offered the opportunity of a hearing. The legislature has created a scheme in which he may state his side of the case before a properly constituted Tribunal under the Act, namely, The Commercial Registration Appeal Tribunal, and not by way of appeal but in the first instance. It is important that it be recognized that section 7(4) maintains the position of the parties as one in which the Registrar is the applicant who must make his allegations before the Tribunal and the registrant is the respondent who if he desires to do so may reply to the allegations made against him.

In these circumstances, in our view, the legislature has provided the necessary scheme which satisfies the requirements of natural justice, always assuming of course that the hearing before the Tribunal is properly conducted. It is not a sine qua non of the principles of natural justice that the effective decision cannot be referred from one person who has a function to perform in the process to another. The proper interpretation of the statute as we hold is that, assuming the registrant requires a hearing, the real and only decision as to whether or not his

registration is to be suspended, is that of the Tribunal when it makes the determination that the Registrar shall be authorized to proceed or shall be prohibited from doing so. Subsection 4 of section 7 makes this clear in the final words where it says that "the Tribunal may substitute its opinion for that of the Registrar" which of course it does after fully hearing both sides.

In these circumstances, it would defeat the operation of the statute to prohibit the Tribunal from hearing these proceedings. To conduct a hearing is what the statute requires the Tribunal to do. There are no grounds for certiorari in this case because a determination has not yet been made by the Registrar which is subject to being quashed for impropriety. Moreover, it is not a situation in which an order by way of declaration of the rights of parties would be appropriate or would be of assistance to either one. To put the matter shortly, this application is premature, it being our finding that no decision has yet been made.

In reaching this conclusion, we have considered the authorities brought to our attention by Mr. Forbes, in particular, Re Cardinal and Board of Commissioners of Police of City of Cornwall (1974), 2 O.R. (2d) 193; Re French and The Law Society of Upper Canada (No. 2) (1974), 1 O.R. (2d) 514; Re Canada Metal Co. Ltd. et al. and MacFarlane (1974), 1 O.R. (2d) 577.

We do not regard these decisions as helpful. The cases cited, without our canvassing them in detail, deal with a situation where the first determination resulted in an order or final disposition of the matter by the body deciding it after which an appeal might result, or a situation where there has been no basis for the proceedings taking place.

Had it appeared from the reasons of the Registrar in the case at bar that no ground was cited by him which could form the basis for the suspension of the licence on the grounds set out in section 5(1)(b) or (c), the matter might have been different. I refer to a situation where the Registrar might make no allegation or submission which is directed towards any of those grounds. That is not the case here. In his reasons he submits material which is directed to grounds set out in section 5. Whether or not he can support them by evidence is not a matter for us to consider but there is no other basis upon which we consider we can intervene. Therefore, the application will be dismissed.

Following the result, costs will go to the respondents.

Released: October 28, 1974

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

ZUBER, WEATHERSTON and REID, JJ.

IN THE MATTER OF THE MOTOR VEHICLE	)	<u>D. W. Brown</u>
DEALERS ACT R.S.O. 1970 c. 475 AND	)	for the Appellant
AMENDMENTS THERETO;)	
)	
AND IN THE MATTER OF THE REGISTRAR OF	)	<u>J. M. Davidson</u>
MOTOR VEHICLE DEALERS AND SALESMEN'S	)	for the Respondent
PROPOSAL TO REVOKE THE CERTIFICATE OF)	
REGISTRATION OF HENRY DE JONGE;)	
)	
AND IN THE MATTER OF AN APPEAL FROM A)	
DECISION OF THE COMMERCIAL REGISTRATION)	
APPEAL TRIBUNAL TO CONTINUE THE)	
REGISTRATION OF HENRY DE JONGE.)	
)	
B E T W E E N:)	
)	
REGISTRAR OF MOTOR VEHICLE DEALERS)	
AND SALESMEN)	
)	
Appellant)	
)	
- and -)	
)	
HENRY DE JONGE)	
)	
Respondent	)	<u>Heard: April 10th and</u>
	)	<u>11th, 1975</u>

ZUBER, J. (Orally)

This is an appeal from the decision of The Commercial Registration Appeal Tribunal dated the 18th of June, 1974 dealing with Mr. DeJonge's certificate of registration pursuant to The Motor Vehicle Dealers Act.

This matter comes to this Court pursuant to s. 9b of The Ministry of Consumer and Commercial Relations act. The powers conferred upon this Court by s. 9b(4) are very wide and are as follows:

"(4) An appeal under this section may be made on questions of law or fact or

both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearsing, in whole or in part, in accordance with such directions as the court considers proper."

A predecessor of this section was dealt with by the Court of Appeal in *Re Registrar of Used Car Dealers and Salesmen and Robert Rowe Motors Ltd. et al* (1973), 31 D.L.R. (3rd) 35. I mention that case simply to point out that the limits on an Appellate Court as described by Arnup, J.A. in that decision are no longer applicable. The section has been changed by deleting the words comparing the appeal to one from a High Court Judge sitting without a jury.

The facts which underlie this appeal in brief are as follows. The appellant was the sales manager of Northtown Ford Sales Limited and as a result of certain dealings was notified by the Registrar that the Registrar proposed to revoke his registration. As a result, DeJonge sought and obtained a hearing by the Tribunal.

The facts that were disclosed by the Tribunal in general terms are as follows. While the sales manager at Northtown Ford, DeJonge had entered into a series of transactions which he describes as private transactions. The pattern in all of these transactions is similar. Upon the approach of a customer who sought a new car, DeJonge either directly or indirectly would acquire the vehicle sought to be traded and would then in turn dispose of this vehicle. In almost all of the cases a profit was either earned or anticipated on the resale. In no case was any change in the registered ownership of the vehicle sought. Mr. DeJonge simply retained the motor vehicle permit and handed it on to the people who succeeded him in these transactions. Further, there is nothing before us to suggest that sales tax was ever paid on any of these transactions between the Northtown customer and DeJonge and a fair inference to be drawn from the surrounding circumstances is that no such tax was paid. In addition, the documentation that accompanies the transactions between the customer and Northtown frequently did not accurately reflect the transaction that actually took place.

Against that background, the Registrar took the view that "the conduct of DeJonge afforded reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty". These words appear in s. 5 of The Motor Vehicle Dealers Act and as a result the Registrar proposed pursuant to s. 6 of The Motor Vehicle Dealers Act to revoke the registration of DeJonge.

Before the Tribunal, it appears that the hearing proceeded on a somewhat different basis. The point with which the Tribunal seemed to be concerned, was whether or not DeJonge was carrying on business as a dealer contrary to The Motor Vehicle Dealers Act. It is common ground that DeJonge was registered only as a salesman and his carrying on business as a dealer would contravene the Act. The fact that the five transactions took place was not seriously in dispute. The Tribunal, however, was of the view that DeJonge did not intend to contravene the Act and as a result his conduct was not contrary to s. 5 and therefore no revocation should take place.

We are in disagreement with the Tribunal in their concept that intention is a necessary element in contravening the Act in carrying on business as a dealer. Whether or not one carries on business as a dealer is a conclusion to be drawn from a transaction or series of transactions. The only intention that is relevant is the intention to perform the acts which comprise the factual base upon which a conclusion can be drawn as to whether or not business is being carried on. Intention was considered by the Tribunal as requiring that DeJonge know that his conduct infringed the Act. Intention construed in that way would mean that ignorance of the law was an excuse and we are in complete disagreement with that proposition.

In our view, the conduct of DeJonge leads to two conclusions. First, the series of transactions in which he participated leads to the conclusion that he was carrying on business as a dealer. The circumstances of these transactions clearly negate the description "private transactions". The failure to transfer the registration, the failure to pay the tax, and the presence of the profit motive all support this conclusion. Further, this series of transactions is in our view sufficient to warrant the conclusion that the conduct of DeJonge was such, or may afford, reasonable grounds for belief that he will not carry on business in accordance with law and integrity as those words are used in s. 5.

We therefore elect to substitute our view for the conclusion reached by the Tribunal. We do not propose to simply revert to the initial proposal of the Registrar and revoke the

registration of Mr. DeJonge. In our view, suspension of his registration for a period of three months dating from today would be an appropriate order. We take into consideration the fact that he was out of work for 26 weeks, having lost his employment at Northtown.

Released: April 15, 1975

IN THE SUPREME COURT OF ONTARIO

(DIVISIONAL COURT)

BEFORE THE HONOURABLE) TUESDAY, THE 9TH DAY OF
MR. JUSTICE O'BRIEN) OCTOBER, A.D. 1984

IN THE MATTER OF the Ministry of Consumer
and Commercial Relations Act, R.S.O. 1980, c.274

AND IN THE MATTER OF the Motor Vehicle Dealers
Act, R.S.O. 1980, c. 299;

AND IN THE MATTER OF the Judicial Review
Procedure Act;

AND IN THE MATTER OF the Registration of Town &
Country Auto Centre as Motor Vehicle Dealer;

AND IN THE MATTER OF the Registration of Howard
Dillon as Motor Vehicle Salesman.

B E T W E E N:

HOWARD DILLON and
TOWN & COUNTRY AUTO CENTRE

Appellants

- and -

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMAN

Respondent

O R D E R

Upon motion made this day, by Counsel on behalf of the Appellants herein, for an Order staying the Order and Decision of the Commercial Registration Appeal Tribunal directing the Registrar of Motor Vehicle Dealers and Salesmen to carry out his proposal to revoke the registrations of the Appellants herein; upon reading the Affidavits of Howard Dillon and Alan Abrams, filed, the Decision and Order of the Tribunal, and upon hearing what was alleged by Counsel for the said Appellants and for the Respondent:

1. IT IS ORDERED that the application be and is hereby dismissed.
2. AND IT IS ORDERED that there be no costs.

Registrar, Divisional Court

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

HOULDEN, HENRY and THOMPSON, JJ.

IN THE MATTER OF The Motor)	
Vehicle Dealers Act, R.S.O.)	
1970, Chapter 475, as amended;	)	<u>B. L. Gluckstein</u> and
Ontario Regulation 98/71,	)	<u>R. Dougherty</u>
as amended.	)	for the Appellant
AND IN THE MATTER OF DON HOWSON)	
CHEVROLET OLDSMOBILE LIMITED,)	
)	
Appellant	)	<u>E. F. Then</u> for the
	)	respondent
- and -)	
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Respondent	)	Heard: November 22nd, 1974
)	

HOULDEN, J. (Orally)

This is an appeal from a decision and order of the Commercial Registration Appeal Tribunal dated October 26, 1973, wherein the Tribunal ordered the suspension of the certificate of registration of the appellant for a period of one month. There is a cross-appeal by the Registrar or Motor Vehicle Dealers and Salesmen (the Registrar) asking that the registration of the applicant be suspended for 90 days and attacking a ruling of the Tribunal on the cross-examination of C. Donald Howson.

Pursuant to sec. 7 of The Motor Vehicle Dealers Act R.S.O. 1970 C. 475 as amended, the Registrar proposed that the registration of the appellant as a motor vehicle dealer and the registration of C. Donald Howson (Howson) as a motor vehicle salesman be suspended for a period of 90 days.

The Registrar, by agreement of counsel for both parties, did not give written reasons as required by sec. 7(1) of The Motor Vehicle Dealers Act. The giving of written reasons appears to be a condition precedent to the hearing before the Tribunal which counsel cannot waive. Written reasons not having been given, on this ground alone, the appeal might be allowed. However, as

counsel for the appellant did not argue this point before us, and as there are other grounds for allowing the appeal, I propose to deal with the appeal as it was presented to us.

After receiving notice of the proposed order of the Registrar, both Howson and the appellant elected in accordance with sec. 7 of The Motor Vehicle Dealers Act to have a hearing by The Commercial Registration Appeal Tribunal.

The appellant is a duly licensed motor vehicle dealer and carries on the business of selling new and used cars in the Municipality of Metropolitan Toronto. It employs 85 persons and has gross sales of approximately \$10,000,000.00 per annum. In 1972, the appellant sold some 1400 used cars of which approximately 650 were sold to the general public in retail sales.

At the hearing before the Tribunal, it was conceded by counsel for the Registrar that at all material times, Howson was the only active officer and director of the appellant. The Tribunal found as a fact that the odometer readings on 18 vehicles sold by the appellant during 1972 had been reduced. Some 10,000 miles had been taken off each odometer. The odometer alterations were performed at the instance, and upon the instructions, of Michael Andy who was the appellant's used car manager in 1972. Andy employed the services of William Tishler, not an employee of the appellant, to effect the alterations. Tishler was a so-called "expert" in turning back or "spinning" odometers; and was well-known among used car dealers as a person who performed that type of service.

After the turning back of odometers was made illegal by the regulations under The Motor Vehicle Dealers Act, Tishler, because of his reputation, carried on business under the name of W. T. Car Clean. This was a cloak for his real business of turning back odometers. The invoices rendered to the appellant for altering odometers were rendered in the name of W. T. Car Clean.

In mid-December, 1972, Howson saw Tishler on the premises of the appellant. Howson knew Tishler and he knew his reputation. Howson made immediate inquiries of his staff as to the reason for Tishler being on the premises. As a result of these inquiries, Howson became aware for the first time of the odometer alterations. Howson took immediate steps to prevent any continuation of this practice.

Counsel for the Registrar conceded that Howson had no knowledge of the odometer alterations and that he did not connive at, or abet such activity.

On January 1, 1973, Andy was promoted to the position of sales manager of both new and used vehicles for the appellant. Howson claimed that the decision to promote Andy had been made when the new car sales manager resigned in December prior to Howson's discovery of the tampering with odometers, and, in addition, Howson said that he made the promotion for humanitarian reasons. In my opinion, the promotion of Andy in view of Howson's knowledge of his activities was most questionable, and should be viewed with grave suspicion.

The hearing before the Tribunal lasted two days and some sixteen witnesses were heard by the Tribunal. Howson gave evidence and was cross-examined at length by counsel for the Registrar. During the cross-examination of Howson, counsel for the Registrar was not permitted by the chairman of the Tribunal to cross-examine with respect to any adjustments that may or may not have been made for customers who had purchased automobiles from the appellant on which the odometer had been altered. Apart from the matter of adjustments on which cross-examination was denied, Howson testified that he did nothing else for the persons who had bought cars on which the odometer had been turned back.

In the course of its written decision and order, the Tribunal made the following findings of fact:

- "1. Howson personally was not aware of any odometer tampering at Don Howson Chevrolet Oldsmobile Limited and that he was an ethical businessman;
2. Howson was the President and sole active officer and director responsible for the day-to-day operation of the corporation. As such he was lax in not checking the mileage recordings on the 650 retail sales of used motor vehicles when they came in and went out of stock and depending entirely upon his managers.
3. The corporation, through its employee Andy, spun back the odometers of 18 motor vehicles, contrary to the Regulations under The Motor Vehicle Dealers Act.

4. When Howson became aware of the tampering of odometers in December, 1972, he did not make certain that none of the motor vehicles whose odometers had been tampered with, would be sold thereafter by the corporation. One such vehicle was sold to James E. McPhee on March 3, 1973.
5. Certain customers of the corporation were damaged, deceived and misled by the fraudulent behaviour of Andy, an employee of the corporation in the course of his employment."

At the conclusion of the hearing, the Tribunal did not see fit to suspend Howson's registration as a salesman; no appeal has been taken from that decision. The Tribunal did, however, order the suspension of the appellant's registration for one month and the appeal is from that decision.

Sec. 19(1) of the Regulations passed under The Motor Vehicle Dealers Act (O.R. 98/71 as amended by O.R. 516/71; O.R. 539/71; O.R. 503/72 and O.R. 180/74) deals with the alteration of odometers. It provides:

Sec. 6(2) of The Motor Vehicle Dealers Act provides for the suspension or revocation of the registration of a motor vehicle dealer. It provides:

"(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if he were an applicant, or where the registrant is in breach of a term or condition of the registration."

Sec. 5(1)(c)(ii) deals with corporations. It states:

"5.--(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(c) the applicant is a corporation and,

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty."

In this connection, the decision and order of the Tribunal stated:

" Nor can the argument of Mr. Shuber be applicable that because of section 5(1)(c)(ii) which states: 'An applicant is entitled to registration or renewal of registration (the Tribunal's underlining) by the Registrar except where the applicant is a corporation and the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;' and since there is no proof of same on the part of Howson, the corporation cannot be penalized. It is to be noted as the underlining above stresses, 'entitled to registration or renewal of registration'. This hearing concerned itself only with the suspension of the registrations and not with the registration or renewal of registration of the Applicants."

With respect, I cannot agree with this reasoning. I do not think it is necessary to decide that the Act should be strictly construed, as contended for by counsel for the appellant, or should be given a large and liberal interpretation, as contended for by counsel for the respondent. In my opinion, the Act is quite clear that the Registrar can only suspend the registration of a motor vehicle dealer if (a) a reason exists that would disentitle the registrant to registration under sec. 5 if he were an applicant, or (b) the registrant is in breach of a term or condition of registration. (Counsel for the respondent admitted that (b) has no application to the present case.) If the words of a statute are clear and unambiguous, then the words should be expounded in their natural and ordinary sense: Commissioners for Special Purposes of Income Tax v. Pemsell, [1891] A.C. 531 at 543. I find no difficulty whatsoever in interpreting the words of the sections of The Motor Vehicle Dealers Act that are applicable to this case. In my view, they are clear and unambiguous. Suspension or revocation of a

motor vehicle dealer's registration cannot be made on any other ground than the two grounds that I have set out.

Under sec. 5(1)(c)(ii) in the case of a corporation, the past conduct of the officers and directors must afford reasonable grounds for believing that the business of the applicant will not be carried on in accordance with law and with integrity and honesty. Argument has been addressed to us as to whether "and" in sec. 5(1)(c)(ii) should be read conjunctively or disjunctively. I do not think we need arrive at a firm conclusion on this point. Even if "and" is read disjunctively, I do not think from a careful reading of the evidence and specific findings made by the Tribunal, that the past conduct of Howson afforded reasonable grounds for believing that the business of the appellant would not be carried on in accordance with law or with integrity or with honesty. Unfortunately, the Tribunal did not address itself to this question, and therefore, we must arrive at our own conclusion on it. Although I have some doubts on the matter, I am not prepared, particularly in view of the specific findings of the Tribunal who saw the witnesses and heard their testimony, to find that the requirements of sec. 5(1)(c)(ii) have been met.

In making its order of suspension, the Tribunal also relied on the doctrine of vicarious liability of an employer for the fraudulent acts of an agent committed in the course of his employment as expounded by the House of Lords in Lloyd v. Grace, Smith & Co., [1912] A.C. 716. I can see no basis for the application of this doctrine to this case. The Motor Vehicles Act, clearly states the grounds for which the registration of a motor vehicle dealer may be cancelled. The manner in which the officers and directors have handled and managed their employees may be most relevant in deciding if the provisions of sec. 5(1)(c)(ii) have been violated. Sec. 5(1)(c)(ii) does not require a finding of personal dishonesty or lack of integrity on the part of the officer or director. The act is passed for the protection of the public and the way in which an officer or director has managed his business may be of considerable importance in deciding that the registration of a motor vehicle dealer should be suspended or revoked.

If, in this case, the Tribunal had addressed its mind to the right question, and if the Tribunal had found that the past conduct of Howson afforded reasonable grounds for believing that the appellant's business could not be carried on in accordance with law and with integrity and honesty, I would not have interfered with that decision. I am troubled by the matter in which Howson conducted his business, and I am particularly troubled by his

action in promoting Andy some three weeks after his conduct in connection with the odometers had been discovered. I think the Tribunal might have concluded that Howson's business judgment was such that the public would be hurt by the way in which he conducted his business. However, as I have said, I am not prepared in view of the evidence and the Committee's findings, to find that the requirements of The Motor Vehicle Dealers Act have been satisfied so that the registration of the appellant should be suspended.

In his cross-appeal, the respondent has alleged that the Tribunal erred in law in prohibiting counsel for the Registrar from cross-examining Howson as to what adjustments, if any, had been made for customers who had bought automobiles on which the odometers had been turned back. In support of its ruling the Tribunal relied on sec. 8 of The Statutory Powers Procedure Act S.O. 1971 c.47 which provides:

"8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto."

I agree with counsel for the respondent that the Tribunal erred in refusing counsel for the Registrar the right to cross-examine on the matter of adjustments. The answers of Howson could have been most relevant to the question which the Tribunal was called on to decide by sec. 5(1)(c)(ii). I do not think sec. 8 was intended to limit the right of cross-examination; rather, I believe the section was intended to deal with situations where the Registrar, or other person making the allegation, intends to adduce evidence of character, propriety of conduct, or competence. In such a case, the party against whom the evidence is to be adduced, should be furnished with reasonable information of the allegations prior to the hearing so that he can have the opportunity of preparing an answer. However, in view of the number of witnesses that were heard by the Tribunal and the cross-examination that was conducted of Howson, I do not think that the failure to permit cross-examination on this issue justifies sending the matter back for new hearing by the Tribunal. The cross-appeal should, therefore, be dismissed.

For the foregoing reasons, I do not think that the necessary grounds for suspension under sec.5 (1)(c)(ii) have been established and in my opinion, the appeal should be allowed and the

order of the Tribunal set aside. In the circumstances I would make no order as to costs of the appeal or the cross-appeal.

HENRY, J. (Orally)

I agree with all that my Brother Houlden has just said and would like to elaborate on one point only.

The provisions of sec. 7 of Motor Vehicle Dealers Act are crucial to the proceedings before the Tribunal. Sec. 7(1) provides:-

"7.--(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant."

Then by subsection (2), it is provided that the notice shall inform the registrant that he is entitled to a hearing by the Tribunal if he complies with certain requirements, one of which is that he state his intention to require such a hearing. By subsection (3) if he does not require a hearing by the Tribunal then the Registrar may carry out his proposal. By subsection (4), if the registrant requires a hearing by the Tribunal, the Tribunal is required to appoint a time for the hearing and carry it out.

The notice served by the Registrar on the registrant together with the reasons for his proposal are the foundation for all the proceedings which follow. The reasons given by the Registrar, in the administrative law terms, set out the case that the registrant has to meet. The registrant then decides on the basis of the allegations made whether he wishes to have a hearing before the Tribunal at which he can attempt to meet those allegations, or allow the matter to go on the footing that the Registrar has made allegations which he does not wish to meet or cannot meet, in which case the Registrar's proposal may then be carried out. If the registrant requires a hearing, then the Act provides full opportunity to be heard before the Tribunal. There the Registrar must support his allegations and the registrant may in appropriate ways seek to meet them.

The statement by the Registrar of his reasons for the proposal are therefore essential to the conduct of the proceedings and are, in the concept of the Legislature, the say in which the principles of natural justice are met. Here is provided the notice and the proceedings before the Tribunal provide the hearing. Therefore, proper compliance by the Registrar with sec. 7(1) of the Act goes to the jurisdiction of the Tribunal to hear the matter. It follows, therefore, that if the reasons are not given in accordance with sec. 7(1) the foundation of the proceedings is lacking and any further hearing that takes place before the Tribunal is a nullity.

In the context of part of the discussion, it might be pointed out that had the Registrar properly given reasons as required by sec. 7(1) of The Motor Vehicle Dealers Act, those reasons would presumably have raised the issue of the character of the registrant as contemplated by sec. 8 of The Statutory Powers Procedure Act and at that stage information about the allegations made would be revealed. As it is, one is at a loss to understand why, since these allegations do not appear in the proceedings before us, the registrant thought it necessary himself to raise the question of his good character before the Tribunal, there being so far as I can see, no allegations to the contrary which would give rise to this issue. But to state this point is simply to emphasize the importance of the procedure being meticulously carried out by the Registrar as sec. 7(1) of The Motor Vehicle Dealers Act requires because if he does not, then the essentials of the case that the registrant has to meet are lacking.

On the basis of what I have said, lack of jurisdiction in the Tribunal alone provides sufficient grounds for allowing this appeal.

THOMPSON, J. (Orally)

I concur fully in the reasons delivered by my Brother Houlden and I agree substantially with those additional reasons delivered by my Brother Henry. I do, however, desire to add some additional observations of my own.

It would appear from the information furnished to the court by counsel that there was some sort of agreement between counsel before the Tribunal that the Registrar's reasons should be

accepted as having a certain foundation agreed upon by counsel. Unfortunately, that agreement does not appear before us nor do any reasons appear before us in the transcript of the proceedings before the Tribunal. I, therefore, look upon the situation as a case where reasons have not been given within the meaning of sec. 7 of The Motor Vehicle Dealers Act.

Whatever the agreement of counsel may have been, I, like my Brethren, consider that reasons of the Registrar in conformity with sec. 7 of The Motor Vehicle Dealers Act are a condition precedent to the jurisdiction of the Tribunal to hold a hearing. I think that follows from subsection (3) of sec. 7 which provides:

"(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection 2, the Registrar may carry out the proposal stated in his notice under subsection 1."

In addition, I think subsection (4) is important:

"(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold a hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

I think it is implicit in that subsection that the Tribunal having power to substitute its opinion for that of the Registrar, must of necessity be cognizant of the reasons given by the Registrar in the notice.

I repeat, that my view is the provisions of the Statute requiring reasons to be given by the Registrar in the notice to the registrant or the applicant is a condition precedent and I will further state that I am of the opinion that that condition or the conditions provided by that provision of the statute may not be waived by the parties; the Act is for the benefit of the public and I think that the reasons of the Registrar or the reasons the

Registrar proposes to give are essential to the whole proceedings and that their presence cannot be waived. I agree in the result.

Released: November 28, 1974

Reported: 6 O.R. (2d) 1975 p.39

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT
REID, ROSENBERG and BOWLBY, JJ.

B E T W E E N:)	
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN)	
)	
Appellant	)	<u>M. W. Bader, O.C.</u> for the
	)	appellant
- and -)	
)	
EASTWAY FORD SALES LTD,	)	<u>J. Richler,</u>
	)	for Eastway Ford
W. AND M. STOLLERY)	
)	
Respondents	)	<u>Miss M. G. Courtenay</u>
	)	for W. and M. Stollery
)	
	)	<u>Heard:</u> January 18, 1988

Appeal by the Registrar of Motor Vehicle Dealers and Salesmen, appellant, from the decision and order of the Commercial Registration Appeal Tribunal dated August 29, 1986.

Appeal dismissed, except that sentence beginning with "Further, it invests the Registrar with power to revoke any or all such registration at his unfettered discretion should there be, in his opinion, any further violation of the said Retail Business Holidays Act or any other legislation which may at any future time be enacted to replace it", which ends the fourth paragraph on Page 4 of the reasons for decision and order of the Commercial Registration Appeal Tribunal released October 7, 1986, be deleted.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTReid, Cory, Holland, JJ.

IN THE MATTER OF THE MOTOR)
 VEHICLE DEALERS ACT, R.S.O.) R.A. Blair and
 1970, c.475, as amended, and) C.O. Spettigue
 the Regulations thereunder;) for the Appellants

AND IN THE MATTER OF THE)
 MINISTRY OF CONSUMER AND)
 COMMERCIAL RELATIONS ACT,)
 R.S.O. 1970, c. 113, as)
 amended;)

AND IN THE MATTER OF an)
 Appeal from a Decision and)
 Order of the Commercial) M.W. Bader and
 Registration Appeal Tribunal) P. Wiley
 dated the 17th day of March,) for the Respondent
 1980)

B E T W E E N:)

HERMAN MOTOR SALES INC.,)
 Operating as Sunparlour)
 MOTOR SALES, and STEVEN)
 A. HERMAN)

Applicants)
 (Appellants))

- and -)

THE REGISTRAR OF MOTOR)
 VEHICLE DEALERS AND)
 SALESMEN)

Respondent)

Heard: July 2, 1980

CORY, J. (Orally):-

The licence of the appellants has been revoked by the Appeal Tribunal ("The Tribunal"). A number of objections have been taken to that decision. The first is that a Supplementary notice

was given and that it was improper and should not have been considered.

The history giving rise to the supplementary notice is as follows. The Registrar determined that steps should be taken in light of a situation which became apparent at the Sunparlour Motor Sales. At the same time, criminal proceedings were under way alleging fraud arising out of transactions entered into by Sunparlour Motor Sales and Mr. Herman. Rather than delay the proceedings pertaining to the licence, pending the disposition of the criminal case, it was decided that thirteen instances of alleged wrongful acts should be brought forward as the basis for the revocation of the licence. Some eighty-two other instances were referred to in the charge of fraud.

Before the matter came on for hearing before the Commercial Appeals Tribunal, the fraud matter came before His Honour, Judge Nosanchuk and a plea of guilty was entered on behalf of the respondents Steven A. Herman and Sunparlour Motor Sales.

When the plea of guilty was entered, the supplementary notice was then given to the respondents making reference to the vast majority, at least 77 out of 82 of the transactions which formed the substance of the fraud charge. It is the position of the applicant that the supplementary notice was improper on the ground that the respondent was prejudiced. By analogy, reliance was placed upon those cases wherein the court had determined that matters arising subsequent to the cause of action, commenced by a writ of summons or petition, could not be added to that action or petition. It is to be noted, however, that there is nothing in The Motor Vehicle Dealers' Act or The Ministry of Consumer and Commercial Relations Act which prohibits giving such a supplementary notice. It is very fairly conceded on behalf of the appellant that the notice was duly served upon the respondents in ample time to prepare their case so that there is no denial of natural justice.

It would be most unfortunate if the procedural restrictions imposed upon a tribunal such as this were to be of such a narrow nature that it could not look into all matters properly coming before it requiring investigation. So long as reasonable notice of the charges which the respondents were facing, has been given them, there can be no basis for arguing that a supplementary notice is invalid. This ground of appeal cannot be accepted.

It was next contended that evidence was improperly received by the Tribunal; in particular a document filed as exhibit 13. This document contained a summary of the transactions which

formed the basis of the charge of fraud where it was filed as an exhibit. In these particular circumstances, the document was admissible and constituted evidence upon which the Tribunal could base its decision.

The factors which lead to that conclusion are these. The appellants were charged with fraud. A plea of guilty was entered. Exhibit 13 on the proceedings before the Tribunal was marked as exhibit 1 in the fraud proceedings. Although there was some discussion as to what, if any, portions of it were not accepted as correct at the hearing of the fraud charge, the only sworn testimony before the Tribunal was to the effect that the evidence as to the changes made on the odometer readings was agreed upon as correct. Only the remarks column of exhibit 13 was to be excluded from the consideration of Judge Nosanchuk on the fraud charge.

Under those circumstances, Judge Nosanchuk accepted the documents as an exhibit. No doubt partially based on that document as a summary of the transaction, he fined the accused \$10,000 and provided that restitution was to be made as a condition of probation. The restitution to be made to the various vehicle owners was in the amount of \$8,750.00. No appeal has been taken from the sentence imposed by Judge Nosanchuk. Both the fine and, more particularly, the restitution must to some extent have been based upon the document exhibit 13. Further, there was the evidence of a witness called before the Tribunal that exhibit 13 was made up from documents in the possession of the respondents. Indeed the respondent Herman admitted that such documents were in his possession, documents both as to the purchases that he made of used cars and also the sales. In light of all the circumstances, it was appropriate and proper for the Tribunal to admit the document, to place reliance upon it and to come to conclusions based upon it.

It was next contended that the test applied by the Tribunal was inappropriate. The Motor Vehicle Dealers Act s.5 (4)(c) provides:

An applicant is entitled to registration or renewal of registration by the Registrar except when,

- (c) the applicant is a corporation and,
 - (i)
 - (ii) the past conduct of its officers or directors offered reasonable grounds for belief that its business will not be carried on

in accordance with law and with integrity and honesty:

It was argued that the test is not solely retrogressive but should be based upon the evidence pertaining to what may happen in the future. Accepting that submission for the purposes of argument, it may be adequately dealt with by stating that in the experience of mankind, when assessing the probable future actions of men, some reliance may properly be placed on the past acts of the individual to be assessed. In light of the number of instances where the odometer was apparently turned back by a substantial amount, the finding of the Tribunal was appropriate. Further, the reasons of a tribunal such as this should not be scrutinized with the same scrupulous attention to detail as the reasons of a court. In this instance the decision was expressed with such clarity that there can be no doubt as to the findings of the Tribunal. We are not satisfied that an improper test was utilized by the Tribunal in reaching its conclusions.

It was next argued that the penalty which it imposed was inappropriate under the circumstances. Reliance was placed upon the past good behaviour and the evidence given as to the very fair deals and exemplary business conduct of the appellants. However, the Act and Regulations stress the importance of odometer readings. There can be no doubt that the readings form the basis for the assessment in value of most vehicles. To tamper or interfere with the odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer.

In this case, the dealer has pleaded guilty to a charge of fraud involving a number of documented instances of tampering with the odometer. In those circumstances, grievous as the result may be for the appellants, the penalty was appropriate and one which was amply justified by the conclusions of the Tribunal.

Lastly, objection was taken to the fact that the decision of the Tribunal was signed only by the Chairman. However, it is quite clear that Mr. Yaremko was speaking for the Tribunal and its decision is written in that manner. Nonetheless, it would be more satisfactory if all members of the Tribunal were to indicate on the reasons that they agreed with or dissented from the conclusions expressed by the Chairman.

The application will therefore be dismissed.

REID, J.

There are some special circumstances in this case which justify a diversion from the usual course of things, that is, that costs follow the event. There was a procedure adopted by the tribunal which we think was quite properly the subject of discussion in this Court. That was the issue of a supplementary notice. There is nothing that bears directly on its propriety, or impropriety for that matter, in the legislation and we think therefore that the appellant was justified in coming to this Court to seek the decision of this Court on that point. The decision on the point has been against the appellant; nevertheless, the tribunal will have the benefit of our decision with respect to the propriety of its procedure.

Also, there was another point which we thought was worthy of an expression of opinion by us and justified the appellant in coming here and that was the way in which the decision was executed. It bore only the signature of the Chairman. In that sense it diverged from the practice of courts generally and, in my own experience, most tribunals. Mr. Justice Cory has said it would be preferable for that procedure to be altered in the future. We think that each member participating in the decision should indicate his concurrence or dissent on the judgement document, over his signature. That would eliminate any concern on the part of a registrant that his matter had not been deliberated by the entire tribunal. It would certainly eliminate the need for any affidavit to be filed in this Court to prove things one way or the other. We understand that Mr. Bader was prepared to offer an affidavit on the subject to us.

Therefore, because there were two points of the tribunal's procedure which have now been clarified, we think that there should be no order of costs. I have endorsed the Appeal Record as follows: "The appeal is dismissed for oral reasons given by Cory, J. No costs."

Released: September 15, 1980

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

BEFORE:

THE HONOURABLE MR.)	
JUSTICE SOUTHEY)	
)	
THE HONOURABLE MR.	)	MONDAY, THE 14TH DAY OF
JUSTICE SAUNDERS)	
	)	MAY, A.D. 1984.
THE HONOURABLE MR.)	
JUSTICE SMITH)	

IN THE MATTER OF The Motor Vehicle Dealers
Act, R.S.O. 1980, Chapter 299;

AND IN THE MATTER OF The Ministry of Consumer
and Commercial Relations Act, R.S.O. 1980,
Chapter 274;

AND IN THE MATTER OF the Decision and Order of
the commercial Registration Appeal Tribunal
dated the 24th day of February 1983.

B E T W E E N :

RICHARD McCLOCKLIN

Applicant,
(Respondent)

-and-

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN,

Respondent.
(Appellant)

O R D E R

UPON motion made this day by way of an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from the Decision and Order pronounced by the Commercial Registration Appeal Tribunal on the 24th day of February, 1983, and upon hearing read the Decision and Reasons of the Commercial Registration Appeal Tribunal and what was alleged by counsel on behalf of the Registrar, no one appearing for the Respondent.

1. IT IS ORDERED that the appeal be, and is hereby granted.
2. AND IT IS ORDERED that the Decision and Order of the Commercial Registration Appeal Tribunal dated the 24th day of February, 1983, be, and is hereby set aside.
3. AND IT IS FURTHER ORDERED that the Registrar of Motor Vehicle Dealers and Salesmen be, and is hereby directed to carry out his Proposal dated the 6th day of October, 1982, to refuse to grant registration to the Respondent herein.

A.P. Bridges
Registrar, Divisional Court

SUPREME COURT OF ONTARIO
DIVISIONAL COURT

BEFORE: Southey/J.-Saunders/J and Smith/J

DATE: May 14/84

DISPOSITION - THIS APPEAL/
IS allowed.

It is apparent that this matter gave the Tribunal great difficulty. With much deference to the learned men of the Tribunal, we are of the view that there was ample evidence to support the conclusion of the Registrar that the past conduct of the applicant (respondent before us) afforded reasonable grounds for belief that he would not carry on business in accordance with law, integrity and honesty, and that the considerations mentioned by the Tribunal are not sufficient to outweigh those grounds. Particularly, we do not think that the certainty of apprehension by the police in the event of further transgressions should be accorded very substantial weight. We also think that these must be full and frank disclosure in the application and at the hearing, before someone with McClocklin's record should be granted registration. We think the Tribunal erred. We allow the appeal, set aside the order of the Tribunal, and desire the Registrar to carry out his proposal.

Signed....Southey.....

CRAT file: McClocklin, Richard

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

CALLON, HOLLAND AND GRANGE, JJ.

IN THE MATTER of The Motor Vehicle)	
Dealers Act, R.S.O. 1970, Chapter)	
475, as amended	)	Y. Mikitchook
	)	for the Appellants
AND IN THE MATTER OF)	
)	
OMEGA AUTO SALES and STANLEY MAZUR)	
)	
Appellants)	
(Applicants)	)	J.B. Johnston
	)	for the Respondent
- and -)	
)	
THE REGISTRAR OF MOTOR VEHICLE)	
DEALERS AND SALESMEN	)	<u>Heard: January 21, 1976</u>
)	
Respondent)	

CALLON, J. (Orally)

The Applicants, Stanley Mazur and Omega Auto Sales appeal against the Decision and Order of the Commercial Registration Appeal Tribunal given on May 8, 1974 wherein the application of Omega Auto Sales for dealership registration was refused and wherein the salesman registration of Stanley Mazur was suspended for a period of three months.

Counsel for the Appellants quite frankly acknowledged at the opening of his submissions that the primary basis of the appeal was an attack on the findings of fact of the Tribunal.

The Decision and Order of the Tribunal appear on pages 7 - 13 inclusive of the Appeal Book. Commencing at page 8 the Tribunal sets forth the evidence upon which it made this finding of fact that the salesman, Mazur, was in fact the active manager of the firm and it also sets forth in some considerable detail the opposing evidence which was given by Mazur himself. It is very clear from the reasons of the Tribunal that it considered the conflicting evidence and made its findings of fact based on its assessment of the credibility of that evidence.

In summary therefore, the findings of fact are supported by substantial evidence and we can see no reason or grounds upon which this Court could interfere with those findings of fact.

The second relief claimed in this appeal is that the penalty imposed of three months suspension was too severe. We do not share that view and hold that the penalty imposed, including the conditions upon which Mazur will be entitled to carry on his employment after the term of suspension has been satisfied are fair, appropriate and reasonable.

In the result, the appeal will be dismissed with costs.

Released: January 26, 1976

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE: Donohue, Cromarty and Holland, J.J.

DATE: Thursday, February 28, 1974

DISPOSITION - THIS APPEAL/Victoria Motor Sales (Kitchener) Ltd
et al

vs Registrar of Motor Vehicle Dealers and Salesmen

R. Heather for applicant.

J. Polika for respondent.

Appeal by applicants Victoria Motor Sales (Kitchener) Ltd.,
Harry E. Dennis, and cross-appeal by Registrar of Motor Vehicle
Dealers and Salesmen from order of The Commercial Registration
ASppeal Tribunal, May 8, 1973.

Judgment: Appeal and cross-appeal both dismissed without costs.

Appeal dismissed without reasons.

Cross-appeal dismissed without reasons.

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE: Reid, Southey, Maloney JJ.

DATE: 20th January, 1977

DISPOSITION - THIS APPEAL/Whitney Car Sales Ltd and Walter Whitney
vs Registrar of Motor Vehicle Dealers and Salesmen

The order of the Commercial Registration Appeal Tribunal decision, dated the 29th day of May 1975 is affirmed subject to deleting from page 16 thereof the dates July 1, 1975 and August 31, 1975, and 31 December 1976 and substituting therefore the dates March 1st, 1977, April 30th, 1977 and August 31st, 1978 respectively.

In all other respects, this appeal is dismissed with costs.

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE: O'Leary, Reid, Steele JJ.

DATE: March 3rd, 1986

DISPOSITION - THIS APPEAL/Hudac Home Warranty Program vs
Booth, A. et al.

APPELLANT B. Campbell

RESPONDENT M. Spears

Without ruling on the correctness of all findings of the Tribunal allowed by the appellant, we are satisfied as to the following:

(1) that there is ample evidence to support the finding of the Tribunal that the purchasers had been induced to buy their units by a material misrepresentation on the part of the vendor and that they were therefor entitled to rescind their purchase and to require that their deposits be refunded.

(2) that the Tribunal on the evidence was justified in concluding that the vendors had neither the ability nor inclination to complete the purchases at any relevant time and that accordingly the purchasers were entitled to terminate their contract and demand the return of their deposits.

Accordingly, the purchasers had a cause of action against the vendor for the return of their deposits based on the vendors' failure to perform the contract and under Sec. 14(1) of the Ontario New Home Warranties Plan Act, the Tribunal was empowered to require the appellant to return the amount of deposits plus interest.

The appeals are therefor dismissed with costs.

Signed....Dennis F. O'Leary, J.

SUPREME COURT OF ONTARIO

September 1986
Solomon, Grosberg
Solicitors for
Respondent/Appellant

DIVISIONAL COURT

BEFORE: Steele/J.-J. Holland/J and White/J

DATE: Mar.13/87

DISPOSITION - THIS APPEAL/
IS allowed. No costs.

The judgment of the Court was evidenced properly before the tribunal. It is implicit in such judgment that there was a contract and breach thereof. This cannot be challenged before the tribunal. However, this does not address all issues that had to be determined by the tribunal under sec.14 of the Act and the definitions relating thereto. The matter is returned to the tribunal to proceed accordingly.

Signed....Steele.....

CRAT file: Ciardullo, Joseph

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE:

THE HONOURABLE MADAM JUSTICE BOLAND	)	FRIDAY, THE 12TH DAY
)	
THE HONOURABLE MR. JUSTICE SAUNDERS	)	OF SEPTEMBER, 1980.
)	
THE HONOURABLE MR. JUSTICE DUPONT)	

IN THE MATTER OF The Ontario New Home
Warranties Plan Act, 1976, S.O. 1976,
Chapter 52;

AND IN THE MATTER OF Frank Kehoe and
Margaret Kehoe;

AND IN THE MATTER OF a hearing before the
Commercial Registration Appeal Tribunal.

B E T W E E N :

THE CORPORATION DESIGNATED TO ADMINISTER
THE ONTARIO NEW HOME WARRANTIES PLAN ACT,

Appellant,
(Respondent)

-and-

FRANK KEHOE AND MARGARET KEHOE

Respondents.
(Applicants)

O R D E R

UPON motion made unto this Court on this day by counsel on behalf of the Appellant, by way of an appeal from the Decision and Order of the Commercial Registration Appeal Tribunal dated November 6, 1979, in the presence of counsel for Respondents, upon hearing read the pleadings and proceedings herein, the evidence adduced at the hearing, the Decision aforesaid, and upon hearing counsel for the parties:

1. THIS COURT DOTH ORDER that this appeal be, and the same is hereby dismissed with costs to the Respondents forthwith after taxation thereof.

A.P. Bridges
Deputy Registrar, S.C.O.

MARCENKO, Doreen
and LEROY, Harry

9 CRAT 58

The Tribunal's decision was upheld by the Divisional Court on January 30th, 1981 in favour of Marcenko. No formal Order was taken out and there are no Reasons of the Court available.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTJ. Holland, Callaghan, Trainor, JJ.

IN THE MATTER OF a hearing before	)	<u>R. Kronick</u>
The Commercial Registration Appeal	)	for the applicants
Tribunal pursuant to Section 16 of the	)	(appellants)
Ontario New Home Warranties Plan)	
Act, 1976, Statutes of Ontario 1976,)	
Chapter 52, as amended, pursuant to the)	
request of the applicants, Ross)	
McDonagh and Joseph Palmerio)	
)	
B E T W E E N)	
)	
ROSS McDONAGH AND JOSEPH PALMERIO	)	<u>B. Campbell</u>
	)	for the respondent
Applicant (Appellants))	
- and -)	
)	
THE CORPORATION DESIGNATED)	
TO ADMINISTER THE ONTARIO NEW)	
HOME WARRANTIES PLAN)	
)	
Respondent	)	<u>Heard: November 12, 1980</u>

J. HOLLAND, J. (Orally):-

The applicants appeal to this Court from the decision and order of The Commercial Registration Appeal Tribunal dated the 27th of April, 1979, ordering the respondent not to pay the applicants' claim for financial loss pursuant to section 14(1)(a) of the Ontario New Home Warranties Plan Act, 1976, as amended.

We are all of the view that this appeal must be dismissed. Here, it is not disputed that Marvo Construction Co. Ltd. owed some \$86,000 to Leader Construction (Ontario) Limited from prior business dealings, which prior business dealings were unrelated to the construction of the contemplated condominium building involved in the present proceeding. The applicants are the principals of Leader Construction (Ontario) Limited.

It was alleged before the tribunal that this debt owed by Marvo Construction to Leader was assigned by Leader to the two applicants. As a result of this alleged assignment, the two applicants each entered into an Agreement of Purchase and Sale with

respect to a condominium unit in the contemplated building and the debt owed by Marvo to Leader was written off by setting off against this debt the cost of acquiring the condominium units.

This building, because of financial difficulties of Marvo, was transformed into a rental building rather than a condominium building.

The evidence is silent as to where this contra account arrangement was conceived relative to the time at which it became known that Marvo was in financial difficulties and that the building would not proceed as a condominium.

The applicants say that each is entitled to recover from the guarantee fund established under the statute the full purchase price set out in each of the Agreement of Purchase and Sale.

The tribunal heard evidence which evidence did not include the evidence of either of the applicants and made the following findings:

- 1) There was no proof offered that Leader Construction owed any money to the Applicants;
- 2) No moneys were paid by the Applicants to Marvo by way of deposit or otherwise;
- 3) Exhibit 10A states that "The Companies interest in above two units were transferred to Mr. Palmerio and Mr. McDonagh". The Tribunal finds no such proof of such a transfer;
- 4) The contrad account eleven months after the Agreements were signed is not a deposit by the Applicants under the Act, its Regulations or by definition; and
- 5) The Applicants suffered no financial loss.

In our view, the plan under this statute is designed to guarantee damage or financial loss arising out of contractual relationships between a vendor and an owner in relation to a specific property. It was not designed to guarantee debts owing between such parties that have no bearing or relation to such a contractual relationship as exists in the present case. Debts between contractors and sub-contractors unrelated to a specific agreement of purchase and sale of a specific property are clearly not within the scope of the legislation. In this case the

tribunal found as a fact that there was no proof of a transfer of the interest of Leader Construction in the subject properties to the applicants and that the applicants suffered no financial loss. These findings were supported by the evidence before the tribunal. Exhibits 10A and 10B did not establish the assignment of the interest allegedly lost and this is a necessary condition of damage which must be established under s.14(1)(a) of the statute.

The appeal is accordingly dismissed.

Released: November 20, 1980

Re Peel Condominium Corp. No. 199 and Ontario New Home Warranties Plan et al.

(Indexed as: Peel Condominium Corp. No. 199 v. Ontario New Home Warranties Plan)

High Court of Justice, Divisional Court, Boland, Chadwick and Isaac JJ. July 28, 1989

Administrative law - Judicial review - Availability - Alternative remedies - Warranties plan denying coverage to condominium but failing to give notice of entitlement to hearing - Limitation period for application for hearing expiring but tribunal having discretion to waive - Condominium having alternative remedy - Application premature - Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c. 274 s. 10(7) - Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, ss. 14, 16.

The respondent developer constructed the applicant condominium corporation's buildings between 1973 and 1976. It was registered as a condominium corporation in 1979. The developer was registered under the Ontario New Home Warranties Plan in 1978 and in 1982 the applicant gave notice to the respondent plan of two problems with the common elements, namely the roof and the exterior masonry wall. The plan rejected the complaint about the roof and the other complaint was held in abeyance because of litigation between the applicant and the developer. The claim was renewed in 1985. The technical manager of the plan then learned from the developer that the original occupants of the building took possession under leasehold interests and informed the applicant that the plan did not extend to buildings converted from leaseholds to condominiums. The letter did not include a notice of entitlement to a hearing as required by s. 16(2) of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350. The applicant brought this application for judicial review.

Held, the application should be dismissed.

- a The applicant was not treated fairly, since the plan did not inform the applicant that it was considering the issue of coverage under the Act and did not seek input from the applicant. However, under s. 16 of the Act the applicant was entitled to a trial de novo, which made the application for judicial review premature. The fact that the application for a trial de novo was untimely could be cured, albeit in the tribunal's discretion, under s. 10(7) of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c. 274.
- b The plan's decision to deny coverage was a decision under s. 14 of the Ontario New Home Warranties Plan Act, although it

did not address the issue of whether the complaint concerned a structural defect. The issue of whether the project was covered by the Act, was a necessary preliminary one and inherent in a decision whether a complaint concerned a particular type of defect. It followed that the plan did not make an error in jurisdiction and the court should be loath to admit affidavit evidence on that point.

- c. Canadian Pacific Airlines Ltd. v. Williams, (1982) 1 F.C. 214; Re Keeprite Workers' Independent Union and Keeprite Products Ltd. (1981), 29 O.R. (2d) 513, 114 D.L.R. (3d) 162 (leave to appeal to S.C.C. refused 35 N.R. 85n) fold

Other cases referred to

- d Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police (1978) 88 D.L.R. (3d) 671, (1979) 1 S.C.R., 311, 78 C.L.L.C. 14,181, 23 N.R. 410; Metropolitan Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796 (1970), 11 D.L.R. (3d) 336; (1970) S.C.R. 425, 70 C.L.L.C. 33; Re City of Ottawa and Ottawa Professional Firefighters' Ass'n Local 162, Int'l Ass'n of Firefighters (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609.

Statutes referred to

- e Canadian Human Rights Act, S.C. 1976-77, c. 33 - now R.S.C. 1985, c. H-6
Judicial Review Procedure Act, R.S.O. 1980, c. 224
Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c 274
Ontario New Home Warranties Plan Act, R.S.O. 1980, c 350, ss. 14, 16.

- f APPLICATION for judicial review of a decision of the Ontario New Home Warranty Program denying coverage to the applicant.

P.M. Conway, for applicant.

Brian Campbell, for respondent, Ontario New Home Warranties Plan.

- g J.I. Laskin, for respondent, Sanrose Construction (Dixie) Limited.

The judgment of the court was delivered by

- h CHADWICK J:- This is an application under the Judicial Review Procedure Act, R.S.O. 1980, c. 224, for review of a decision of Robert Maling, Manager, Technical Services, Ontario New Home Warranty Program dated July 23, 1986. Maling refused the

applicant coverage under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, in connection with certain major structural defects, on the grounds that buildings which comprise the condominium project were built as a rental project and subsequently converted. Converted condominiums are not available for coverage under the provisions of the

a Ontario New Home Warranties' Plan Act.

Facts

Although there is an issue between the parties as to the facts surrounding whether this project was intended as a rental project or a condominium unit from its first construction, there are a number of facts which are not in dispute.

b Construction of the project began sometime in 1973 and was substantially completed in the early part of 1976. The project itself consisted of twin towers containing 270

c suites and is located at 1400 Dixie Rd., in the City of Mississauga, in the Province of Ontario, and is known as "The Fairways". The project was constructed by the respondent, Sanrose Construction (Dixie) Limited which is owned and operated by two brothers, Jerry and Roman Humeniuk. The project was registered as a condominium corporation March 28,

d 1979. The factual dispute between the parties relates to whether this project was a rental project in its initial stages which was subsequently converted to condominiums or whether, in fact, it was always intended to be a condominium project. The original occupants of the building obtained their interest by way of either a month-to-month lease, a

e fixed-term lease, or a capitalized lease.

The respondent, Sanrose, applied to HUDAC for registration under the Ontario New Home, warranty Program and on February 22, 1978, received a registration number.

f On January 27, 1982, the applicants gave notice to the respondent, Ontario New Home Warranties Plan (Warranty Plan) of problems with two common elements, namely the roof and the exterior masonry wall. At that time, the Warranty Plan was not aware of the history relating to the occupation and ownership of the suites. The Warranty Plan carried out

g inspections of the premises and on September 24, 1982, rejected the roofing claim on the basis it was not a major structural defect within the meaning of the Ontario New Home Warranties Plan Act and regulation. The applicant appealed this decision to the Commercial Registration Appeal Tribunal

h and subsequently abandoned the appeal. At that time the Warranty Plan did not make a finding with reference to the exterior masonry claim and the matter was held in abeyance. Between October, 1982 and December 1985, there was no further communication between the applicant and the Warranty Plan regarding the masonry wall. During this period of time the applicant was involved in litigation with the respondent, Sanrose.

a In December, 1985, the applicant requested the Warranty Plan to review the professional opinions received by them regarding the exterior masonry wall and the proposed correction. The initial opinion given by Robert Maling was to the effect that he doubted whether the problem constituted a major structural defect. A number of meetings took place between the parties for the purpose of determining the type of rectification which would be required to correct the exterior masonry wall problem. A recommendation was made by the Warranty Plan with reference to the rectification. The Warranty Plan at this point in time was complying with its statutory requirements of attempting to conciliate disputes between the parties. Up until then, the Warranty Plan had been acting on a without prejudice basis attempting to find the most economical solution to the problem and had not rendered a decision as to whether the exterior masonry problem was covered under the Warranty Plan.

In an effort to determine the construction history and background relating to the exterior wall, Robert Maling met with the respondent builder, Sanrose, on June 12 and 18, 1986. It was at this time that the Warranty Plan first learned of the background and history of this project as related to them by the respondent, Sanrose. In view of the information learned from the respondent, Sanrose, the respondent, Warranty Plan, advised the applicant on June 18, 1986, that they were considering the matter and that they would be in touch with them in due course.

f On July 23, 1986, Robert Maling wrote a letter to the applicant, reviewing the history of the project which had been gleaned from the respondent, Sanrose. Mr. Maling wrote in part as follows:

g Recently the Warranty Program has met with the developer in the presence of the developer's solicitors and it has asked its own solicitor to become involved in the assessment of the claim.

The Warranty Program's assessment and evaluation of the information at its disposal has been concluded and it regrets that no warranty coverage is available to the Condominium Corporation in respect of the masonry wall claim.

h The buildings which comprise the condominium project were built as a rental project with construction commencing in 1973, and with substantial completion in the early part of 1976.

Subsequently, the units were either rented to individual tenants or a leasehold interest was sold in certain units to a numbered company who subsequently sold capitalized leasehold interests in those units to individual tenants.

a Not until 1979 was application made to convert the rental project into a condominium and after that point in time it is the understanding of the Warranty Program that certain units have been sold to individual purchasers on a freehold-basis.

b Unfortunately, projects that were built before the Act came into effect or even subsequent thereto, that were built and used as rental projects, which have subsequently been converted to condominiums are not available for coverage under the provisions of the Ontario New Home Warranties Plan Act.

A building purchased before the effective date of the Act and occupied as a rental building is not subject to the provisions of the Act.

I believe the foregoing fully explains the Warranty Program's position with respect to this matter.

c The Warranty Plan's position is that this letter constituted a decision made pursuant to s. 14 of the Ontario New Home Warranties Plan Act, R.S.O. 1980, c. 350, and that the applicant in this case should have proceeded by way of appeal pursuant to s. 16 of the Act.

d The respondent, Sanrose, agrees with Warranty Plan's position.

The applicant argued that this was not a decision under s. 14 and if it was a decision under s. 14, the respondent Warranty Plan had failed to comply with s. 16 in giving to the

applicant notice of the entitlement to a hearing. Section 16 reads as follows:

e 16(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

 (2) A notice under subsection (1) shall inform the person served that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under subsection (1) is served on him, notice in writing requiring a hearing to the Corporation and the Tribunal, and he
f may so require such a hearing.

 (3) Where a person served requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.
g

 (4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Decision of the Warranty Plan

Mr. Maling in giving his decision of July 23, 1987, did not include a notice of entitlement to a hearing for the commercial registration appeal tribunal as required by s. 16(2) of the Ontario New Home Warranties Plan Act. The applicant's position is, that as a result of the failure to provide proper notice and to adhere to the procedural requirements set forth in the Act, the decision is
a invalidated.

Further, the applicant argues that Maling, in reaching his decision of July 23, 1986, failed to give notice to the applicant, did not allow them to make representations and failed to treat them fairly before arriving at his decision.

b It is clear from the evidence Maling was involved with all of the parties from the time of the revival of the notice in

c December, 1985, up until June 10, 1986. All of these meetings dealt with the exterior masonry problem and the method of correcting or resolving that problem. It was only on June 12th and 18th when he met with the respondent, Sanrose, that he embarked upon the inquiry relating to the question of coverage and whether in fact the project would be covered under the Act. There is no issue that he did not advise the applicant that this was what he was considering. When he d finally wrote the letter of July 23, 1986, he had no input whatsoever from the applicant relating to the question of coverage. With these facts, we would have no difficulty in finding that the Warranty Plan had not treated the applicant fairly; they did not give the applicant proper notice that they were going to deal with the coverage issue; and they did not allow the applicant to make representations and be heard e before arriving at the July 23, 1986 decision.

f It is clear from the principles enunciated in Re Nicholson and Haldimand-Norfolk Regional Board of Com'rs of Police (1978), 88 D.L.R. (3d) 671, (1979) 1 S.C.R. 311, 78 C.L.L.C. 14,181 (S.C.C.), that the respondents have a duty to treat the applicants fairly. If there had not been any other avenue open to the applicant, and this decision of July 23, 1986, would have disposed of its claim, then we would have allowed this application and remitted it back for a proper hearing.

g However, s. 16 of the Ontario New Home Warranties Plan Act provides for a trial de novo hearing before the commercial registration appeal tribunal. The applicant's position is that Maling's decision of July 23, 1986, was not a decision within the meaning of s. 14 and therefore the applicant has no right to a trial de novo hearing. In the alternative, the h the applicant argues that the Warranty Plan has deprived the applicant of its entitlement to a hearing by not giving the applicant proper notice of that right.

The Warranty Plan's position is that this application is premature and that, though they have erred in not providing the proper notice, the applicant still has a right to proceed with an application to the tribunal to have this matter heard trial de novo, notwithstanding the time limitation set forth in s. 16. The applicant relies upon s. 10(7) of the Ministry of Consumer and Commercial Relations Act a R.S.O. 1980, c. 274 which reads as follows:

10(7) Notwithstanding any limitation of time for the giving of any notice requiring a hearing by the Tribunal fixed by or under any Act, and where it is satisfied that there are

b prima facie grounds for granting relief and there are reasonable grounds for applying for the extension, the Tribunal may extend the time for giving the notice either before or after expiration of the time so limited, and may give such directions as it considers proper consequent, upon such extension.

c Although this section provides some relief to the applicant, it does require the applicant to satisfy the test under this section. We asked both respondents whether they would consider allowing the applicant to satisfy the test set forth in s. 10(7). We are hopeful that the tribunal will look with favour on an application by the applicant, especially in view of the fact that the applicant has been put in this procedural difficulty as a result of the respondent Warranty Plan's failure to comply with its statutory requirements regarding notice under s. 16(2). In the previous decision made by Mr. Maling with reference to the roof in 1982, this right was quite clearly set forth in the body of the decision.

e In view of the fact that the applicant does have a right to proceed by way of a trial de novo application, the question becomes whether this application is premature. Thurlow C.J. in Canadian Pacific Airlines Ltd. v. Williams (1982) 1 F.C. 214 (F.C.A.) dealt with a similar problem relating to the Canadian Human Rights Act, S.C. 1976-77, c. 33, and at p. 215 stated:

f Moreover, it is to the Tribunal that Parliament has given the duty to decide such questions and even if some of them could be regarded as going to the Tribunal's jurisdiction, the court should be slow to interfere when there is no good reason to think that the question will not be correctly decided by the Tribunal, where there is an appeal procedure provided by the statute and a further review open in this Court under the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, and where there is no reason to think that the defence of its position before the Tribunal would be more onerous or costly for the person against whom the complaint is made than by bringing prohibition proceedings.

We are therefore of the opinion that the lack of notice and hearing before Maling and the failure to set out the proper notices required under s. 16(2) can be cured in the trial de novo hearing before the tribunal.

The alternative position advanced by the applicant was that this decision of July 23, 1986, was not a decision within the meaning of s. 14 of the Act and as such there was no right to a hearing, Section 14 reads as follows:

- a 14(1) Where,
 - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - b (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,
- c the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
 - (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.
- d (3) The corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

The decision by Maling dealt only with the issue of coverage and did not go on to determine whether the exterior masonry problem was a major structural defect and to assess the damages. The applicant's position is that this section is very restricted and that the decision made by Maling relating to coverage was outside of s. 14 and the effect of it was to prevent the applicant from proceeding any further.

We are of the opinion that in order for Maling or any other officer of the Warranty Plan to make a decision under s. 16

- f they must first determine whether the applicant qualifies within the meaning of the Act, otherwise applications under s. 14 would be conducted in a vacuum. We are satisfied that the decision made on July 23, 1986, falls within s. 14 and was required to be made by Maling before he could proceed to determine whether the owner suffered damages because of a major structural defect and to make an assessment of these damages. The decision having been made under s. 14 of the Act, the applicant would then have its right to a trial de novo hearing pursuant to s. 16.

Review of the decision

- h The applicant's position is that the Warranty Plan, in coming to the conclusion that the applicant was not covered under the Act, made an error in law going to its jurisdiction. the applicant has suggested that we review the record and additional affidavit material to make a determination that the Warranty Plan was wrong in their interpretation, substitute our finding for that of the Warranty Plan, and remit the matter back for a determination of the major structural defect issue and on assessment of damages.
- a

- The record in this case is rather sparse and does not contain the material on which Mr. Maling made his decision. The applicant spent a great deal of time in reviewing affidavit evidence of original occupiers of these units to support its position that these units were condominiums, not previously occupied rental units within the meaning of the Act. In response to this material, the respondent, Sanrose, also filed affidavit evidence which directly contradicted the evidence contained in the applicant's material. It is impossible at this stage to choose one affidavit over the other. It is obvious that the tribunal, when it hears this matter, is going to have to hear all of this evidence viva voce and make a determination as to the reliability of that evidence. In our view, the applicant is not in a position before us to supplement the record with additional material in order that we can then substitute our opinion for that of Mr. Maling. We would adopt the reasoning of Morden J.A. in *Re Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1981), 29 O.R. (2d) 513 at p. 521, 114 D.L.R. (3d) 162 at p. 170 (Ont. C.A.), where he stated:
- d

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being

emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

f Therefore, excluding the affidavit evidence which was before
us and looking at the record itself, we must then determine
whether in fact Maling asked himself the wrong question and
therefore committed an error which placed his decision outside
of his jurisdiction. The applicant relies upon Metropolitan
g Life Ins. Co. v. Int'l Union of Operating Engineers, Local 796
(1970), 11 D.L.R. (3d) 336 at p. 344 (1970) S.C.R. 425, 70
C.L.L.C 33 (S.C.C.).

This is not a case of a privity clause in an agreement but a
question of statute and whether Maling exceeded his
jurisdiction under the statute by asking himself the wrong
question in dealing with the issue of coverage. We are of the
opinion that the issue of coverage is an integral part of s.
h 14 of the Ontario Home Warranties Plan Act. It must be
determined before a conclusion can be reached under the
provision of that Act. We are not sitting as an appeal
tribunal from that decision but on judicial review. We are
of the opinion that the decision is one that the statute can
reasonably bear: see Re City of Ottawa and Ottawa
a Professional Firefighters' Ass'n Local 162, Int'l Ass'n of
Firefighters (1987), 58 O.R. (2d) 685, 36 D.L.R. (4th) 609
(Ont. C.A.). We are therefore of the opinion that this is not
a case which warrants judicial interference with Maling's
decision and that there is no error of law on the face of the
record.

b We would therefore dismiss the applicant's application with
costs to the respondent, Sanrose. In view of the procedural
error committed by the Warranty Plan in failing to provide the
proper notice required under s. 16(2) of the Ontario Home
Warranties Plan Act, we would not allow that respondent costs
of this application.

c Application dismissed.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Montgomery, Hollingworth, Smith, JJ.

IN THE MATTER OF The Judicial)	
Review Procedure Act, S.O. 1971)	
Volume 2, c. 48;	)	<u>J. Amourgis</u>
	)	for the applicant
AND IN THE MATTER OF The Ontario)	
New Home Warranties Plan Act, 1976,)	
S.O. c. 52;	)	<u>B. Campbell</u> and
	)	<u>P. Hennessy</u> for
AND IN THE MATTER OF the appeal	)	the respondent
hearing of the Commercial)	
Registration Appeal Tribunal of)	
the 8th day of May, 1979.	)	<u>Heard: May 19, 1982</u>
)	
B E T W E E N:)	
)	
STEVE STATHAKIS)	
)	
Applicant)	
)	
- and -)	
)	
THE CORPORATION DESIGNATED TO)	
ADMINISTER THE ONTARIO NEW)	
HOME WARRANTIES PLAN)	
)	
Respondent)	

SMITH, J. (Orally)

In this matter we are all agreed that the application should be dismissed.

The applicant argues that the Board adopted a definition of the word "owner" as used in Regulation 6(1) passed pursuant to the Ontario New Home Warranties Plan Act, that it could not reasonably bear. The definition of "owner" which is found in section 1(g) of the Act means a person who first acquires a home from its vendor for occupancy and his successors in title and a vendor is defined in section 1(n). It means a person who sells on his own behalf a home, not previously occupied, to an owner and

includes a builder who constructs a home under a contract with the owner.

The mortgagee in this case was a vendor, albeit not a registered one, and accordingly the purchaser became an owner and was disentitled to claim by reason of Regulation 6(1). The Board, in the result, did not place an interpretation on the word "owner" which it could not reasonably bear.

Signed....Smith, J.

Released: June 10, 1982

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE: MacKinnon, A.C.J.O., Zuber and Blair, JJ.A

DATE: Wednesday, November 3, 1982

DISPOSITION - THIS APPEAL/Steve Stathakis
vs The Corporation designated to administer the
Ontario New Home Warranties Plan

It is apparent that the tribunal were not persuaded that the appellant had produced the necessary and convincing evidence that there was a financial loss within the meaning of those words as found in s.14(1)(a) of the Ontario New Home Warranties Plan Act 1976 to interfere with that.

In this connection, we also refer to their finding that the appellant had turned from the opportunity of receiving from the vendor under the original contract a promissory note for \$40.m.

We do not propose to interfere with the tribunal's conclusion. In saying this we do not deal with the question of the validity of s.6(1) of O. Reg. 853/76 and we are not to be taken as necessarily agreeing with the tribunal's and the Divisional Court's view of that section.

The appeal is dismissed with costs.

Friday, April 12, 1985

#3 Divisional Court
#29/83

York Condominium
Corp. #340

vs

The Corporation
designated to
administer to the
Ontario New Home
Warranties Plan Act

Before The Hon. Mr. Justice Osler, Henry & J. Holland JJA.

10:05 Court opened
10:05 Judgment:

The appellant, Condominium Corporation appeals from items in a decision of the Commercial Registration Appeal Tribunal, respecting 3 particular alleged deficiencies in the condominium building under s.11(5) of the Ministry of Consumer and Commercial Relations Act. The appeal is at large and this court may exercise all the powers of the Tribunal and may substitute its own opinion for that of the Tribunal. We do not propose to do so in this case. With respect to items (a) and (b) having to do with excess moisture in certain plenum spaces and in the condominium units. We find, that the finding of the Tribunal which was due to inadequate ventilation, rather than to defects in material or workmanship was reasonable, but that, on the balance of probabilities, it was right.

As to item (c) having to do with the curbs of the various balconies, we agree that lack of air entrainment in such curbs was not proved, and that the defect shown to exist, which was for the most part confined to the the spalling of the surface of the concrete, resulted neither in the failure of a load bearing portion of the building, nor in materials and adversely affecting the use of this building for the purpose for which it was intended.

Accordingly, the appeal fails and will be dismissed with costs of the appeal. No order as to costs below.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

GRIFFITHS, EBERLE and ROSENBERG, JJ.

B E T W E E N:)	
)	
YORK CONDOMINIUM CORPORATION	)	<u>J. Hahn</u> , for the
NO. 528	)	appellant
)	
Applicant)	
(Appellant)	)	<u>B. Campbell</u> ,
	)	for the respondent
- and -)	
)	
THE ONTARIO NEW HOME)	
WARRANTY PROGRAM)	
	)	<u>Heard:</u> May 5, 1987
Respondent)	
)	

ROSENBERG J.:

Nature of Application

The appellant appeals to this Court pursuant to s. 11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980 c.274, from the decision of the Commercial Registration Appeal Tribunal (the "Tribunal") rendered October 21, 1985. Section 11 (5) of the said Act reads as follows:

11.-(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

Background

The appellant is a condominium corporation created under the Condominium Act, R.S.O. 1980, c.84, in connection with a forty-unit condominium apartment project. The appellant alleges certain construction deficiencies in the building of the condominium project by the developer. The developer is no longer available to pay any damages that the Condominium Corporation may be entitled to recover and, accordingly, the Condominium Corporation seeks to recover the maximum amount available from the fund established under the Ontario New Home Warranties Plan Act, R.S.O. 1980, c.350 (the "Act"). The said Act provides the following:

13.-(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

...

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

...

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

[Emphasis added.]

Section 14 provides:

14.-(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach or warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

[Emphasis added.]

Section 23(1)(g) provides:

23.-(1) The Corporation may make by-laws,

...

- (g) providing for the establishment and maintenance of the guarantee fund and governing procedures for claiming and determining claims for compensation from the guarantee fund;

Under Regulation 726, authorized by s.23(1) of the Act, the Corporation provided in s.4 thereof:

4.-(1) Each person with a claim under the Plan shall give written notice of the claim to the corporation.

(2) Forthwith upon receipt by the corporation of such notice, the Corporation shall furnish the claimant with such forms as it or the insurers may reasonably require for the purpose of establishing and verifying the claimant's loss.

(3) If the Corporation fails to furnish such forms, the claimant is entitled to make his claim by giving written notice to the Corporation setting forth in reasonable detail information relating to the claim.

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendor as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act.

[Emphasis added.]

The major issue is whether a claim of the appellant is barred by virtue of s. 13(4) of the Act as a result of its not having been made within one year after the registration of the condominium. In its decision, the Tribunal refused to order the Ontario New Home Warranty Program to pay to the appellant \$762,287.04 plus interest, or in the alternative to order that the respondent repair the construction deficiencies.

The basis for their refusal was that the claims were not made within the one-year limitation period and further that the respondents were not estopped from raising the limitation period as a result of responsibilities that they had assumed and letters that they had written after the expiration of the limitation period.

Facts

The declaration and description of the appellant were registered on August 13, 1980. Accordingly, the limitation period terminated at midnight on the 12th day of August, 1981.

The Condominium Act requires that the building be substantially completed and that there be a certificate of the architect to that effect at the time that the declaration is registered. Accordingly, it can be assumed that all major construction had been completed as of August 13, 1980.

At the time of the registration of the declaration creating the Condominium Corporation and subjecting the project to the Condominium Act, the developer was, as the developer invariably is, the owner of all of the units in the condominium project and, accordingly, in control of the board of the condominium. The practical effect of this is that the limitation period starts to run at a time when no claims will be made because the developer would at the outset be making claims against itself. The developer is required to eventually turn over the affairs of the Corporation to an independent board elected by the unit owners. The timing of this will depend on how quickly units are sold. Until there is an independent board created, the only practical way in which notice can be given of defects in construction or breaches of the warranties of the builder is through the complaints of individual unit owners. Even after the independent board has been elected, it will take some time for them to become familiar with the management process and to determine their obligations under the various statutes and to make claims, if they are appropriate, under the Act. This is of some significance since one of the issues before us is whether the appellant's obligation of notice within a one-year period is fulfilled if the symptoms of problems are the subject of written notice to the respondent or whether it is required that the details of the actual defects giving rise to the symptoms and even the method of curing those defects must be contained in the notice.

By January 23, 1981, the new condominium board was submitting deficiency lists to the developer with copies to the respondent. The appellant refers to these deficiencies as water penetration and efflorescence. These lists were submitted in writing and complied with the regulations in that regard. However, the wording used was not specific. The following complaints were made in writing during the one year period that could refer to the efflorescence, water penetration and the wall defects:

- (1) Outside walls to clean, remove stain
- (2) Grouting to repair in places
- (3) Retaining wall beside garage entrance, water leak between sections.

- (4) Leak through ceiling (when raining) on to ramp just inside garage door
- (5) Ceiling leak at Bay-41/42
- (6) Basement:
Ceiling tiles damaged by water. Seal leaks and replace tiles.
- (7) Fifth Floor:
Ceiling tiles damaged by water. Seal leaks, replace tiles.
- (8) Stain on outside walls to be removed.

Note: In addition there are a number of places in the garage and basement where leaks in foundation and floors are suspected at times of heavy rain or spring thaw.

- (9) Grouting to be inspected and repaired as necessary.
- (10) Leak at garage entrance (ceiling) to be located and sealed.
- (11) Leaks in garage ceiling at bays 32, 35, 41 and 42 to be sealed.
- (12) Leaks in wall at NW, SW and SE corners of garage to be sealed.
- (13) Basement:
Replace tiles damaged by condensation.
- (14) Fifth Floor:
Replace ceiling tiles damaged by condensation.
- (15) General:
Stucco has fallen off in some places.

On February 17, 1981, one of the tenants wrote with regard to Unit 303:

I write to advise you that water damage has occurred in the above Condominium.

The writer, however, expressed an opinion as to the cause of the water damage, as follows:

The water damage can be found in the Dining Room ceiling and is caused by faulty workmanship on or around the balcony pertaining to the 4th Floor Condominium (Condo 403).

After the expiration of the warranty period, the respondent wrote to the developer on a number of occasions of which the following, extracted from some of their letters, are examples:

June 30, 1982

Once again the people of this condominium are experiencing water problems in their suites from areas that would appear to be associated with the balconies above. These complaints date back to February of 1981 and fall within the builder's first year warranty period, so it is incumbent upon your firm to perform such work as is necessary to avoid further water problems.

September 24, 1982

On September 16, 1982 an investigation was made by Construction Control Ltd. in regards to the water problems being experienced by the residents of the above condominium.

I was present during part of the time and observed the testing being done therefore, I concur with the finding of Construction Control.

One of the basic problems is the construction of the brickwork, the assembly of which is completely contrary to the Ontario Building Code regarding cavity wall construction, a cavity wall being any wall that has a space between the inner and outer wythe as is the case at 30 Glen Elm where the space between appears to be approximately 1 inch in the area

observed. The Ontario Building Code, under section 4.4.5.14(1)-(3) states that "where the space is not filled, such walls shall conform to the requirements for cavity walls".

In this case the masonry is:

- (1) not parged on the back of the face wythe.
- (2) not vented to allow for dispersal of moisture entrapped between wythes.
- (3) there is no through wall flashings as required by the code.

There is also an absence of vapour barrier in some locations which again is contrary to the code.

The visual result of the existing conditions is the extreme efflorescence on the masonry and the ingress of water into areas of the building.

Further testing on a balcony slab indicates that water is penetrating at the recess in the slab which accommodates the insulation.

As these conditions were existing within the first year of the condominium's registration, and as they were noted to your firm and also to the New Home Warranty Program, it is, under the terms of your registration, the responsibility of your firm to properly make the necessary corrections to the matters at fault. Should you not do so then the New Home Warranty Program will assume your responsibility and proceed to rectify the situation where required. Should we be obliged to do this, your firm will be invoiced for all warranted work done by us, plus administrative costs (and interest where applicable), the recovery of which will be pursued by all legal means.

I would strongly suggest that a meeting be held with all interested parties within the

next few days and that you call the writer upon receipt of this letter so that arrangements may be made. Should we not hear from you by the 30th of September, 1982, the New Home Warranty Program will have no choice but to act in this matter.

[Emphasis added.]

October 14, 1982

{Referring to the letter of September 24, 1982}

... In the letter, a copy of which is enclosed, I noted four problems with the walls of the building, all four of which contravene the Ontario Building Code. It is our mandate, that when a condominium addresses complaints to us, we order the builder to make corrections, or if he fails to do so the New Home Warranty Program assumes the warranty obligations.

[Emphasis added.]

November 16, 1982

Thank you for your attendance and co-operation at our meeting of the 15th.

It is my understanding that High City Holdings will start remedial work directly on two suites, 309 and 213.

- (1) Balconies - The balcony floors will be thoroughly cleaned of all substances to allow for bonding of a traffic membrane. This membrane to be turned up at the wall and bonded to prohibit water from penetrating through the wall. Also holes will be drilled horizontally through the edge of the slab into the depression containing the insulation to allow for drainage of trapped moisture.

- (2) Walls - The exterior brick walls of both suites will be drilled at the concrete floor slab line and wicks and/or pipes inserted at appropriate intervals to allow for venting of entrapped moisture. I would suggest these holes be sloped from below the slab line up into the cavity being careful to see that the pipe/wick is at the floor line when inserted and not above it.

It is also my understanding that these actions taken are to be monitored to judge their effectiveness and if it appears that the desired results are not obtained then further steps will be taken. Should it prove effective then High City Holdings will, at the arrival of good weather next year, institute a like action on all remaining masonry walls. Prompt attention need also be paid to correcting problems within the suites where damage has occurred.

Further work is to be done on the foundation walls at suites 106 and 206. The area to be dug up, waterproofed and caulked where necessary and the grade raised at the wall to increase drainage away from the building.

I would appreciate a reply to this letter informing me of your agreement to all points raised.

December 9, 1982

Further to my letter to Mr. Wurman of September 24, 1982, I must now add one more Code violation to the many that now exists regarding the masonry walls.

On December 7, 1982, a Borescope examination was done in five different locations on the building and while it showed cavities in all walls it also showed a new problem which is the total lack of ties between the inner and outer wythes.

This violates the Ontario Building Code Section 9.20.9.2 - 90.20.9.3.(1) and, if you will, 9.20.9.7.(1).

I am having a difficult time understanding how so many things could go wrong with a relatively simple, straightforward part of the construction.

I also spoke with Mr. Serota and informed him of the fact that the New Home Warranty Program has now taken over the responsibility of your warranty in effecting the immediate repairs to suites 213 and 309. All costs will be invoiced to your firm with appropriate surcharges as described in my letter of December 2, 1982.

April 6, 1983

This letter is further to previous correspondence and your condominium corporations's dealings to date with Mr. Dade of this office.

I am informed by Mr. Dade that two matters of major concern to York Condominium Corporation No. 528 remain outstanding, those are: (1) water entry associated with the balcony slab/wall junction detailing and (2) excessive efflorescence on the exterior masonry walls. It is our opinion that the rectification of these two matters should be attended to my High City Holdings Limited under the provisions of their warranty. To that end, I have today notified them that they are required to commence the repairs by May 2, 1983.

As you are aware, the Warranty Program has investigated the cause of both problems. Mr. Dade feels we are not sufficiently prepared to solve those matters and, should High City Holdings fail to honour their warranty obligations, please be assured that the Warranty Program will do so in their stead.

I trust if you have any questions regarding the Warranty Program's intentions you will contact either Mr. Dade or myself.

[Emphasis added.]

The matter was first heard by the respondent as required under s.16 of the Act and in its decision, dated December 19, 1984, it dealt with the complaints as separate and unrelated and stated as follows:

In further review of the claims, it has become evident that there are five items to be considered and, for simplicity's sake the Warranty Program has identified them as follows.

- 1) Efflorescence
- 2) Balcony slabs
- 3) Exterior wall construction
- 4) Vapour barriers
- 5) Vertical cracks in brickwork.

With regard to item 1, the decision of the respondent was as follows:

- 1) The problem of staining and efflorescence was reported to the Warranty Program prior to the first year anniversary of the registration of the condominium declaration and was addressed by us as a vendor's warranty matter. The masonry contractor had not, in our opinion, properly cleaned the brickwork after construction as good building practice would require. In addition, some efflorescence had occurred. The Warranty Program arranged and paid for the proper cleaning of the brickwork during October 1983 at a cost of \$27, 100.00.

[Emphasis added.]

From this, it can be seen that the Warranty Program treated the efflorescence as having been the subject of proper notice during the limitation period but treated it as the problem and not as the symptom of the problem. When this matter came before the Tribunal on June 10, 11, 12, 13, 14, 19 and 20, 1985, they found:

We feel free and confident to state at the outset that this building was extremely shoddily constructed in many ways and we can make that a finding of fact for whatever it is worth. For example, the manner in which the vapour barriers were installed (or not installed) in the walls of the building was, in a word, disgraceful. The fact that this appalling shoddiness was approved in the periodical inspection reports both by the architects and the municipal inspectors is very hard to view with other than the gravest misgivings as to either the competence or integrity of such functionaries in the discharge of their duties - duties owed to parties whom we deem to have been injured or who will in the future be injured, namely, present and ultimate owners and occupants of the units and common elements of 30 Glen Elm Avenue. As well, the fact that water has entered and may in the future enter many of the units causing expense, inconvenience, and loss of property value to the owners and the occupants and their successors (as well as the condominium corporation itself in respect to any common element affected) is deplorable as are the stains and marks of efflorescence and other deficiencies referred to in evidence, particularly in the highly impressive expert presentation of Mr. Tony Alexander, P.Eng. who was called on behalf of the Appellant and which must surely rank as one of the most informative and persuasive of its type preserved in the Tribunal's annals.

[Emphasis added.]

The evidence of Mr. Tony Alexander was as follows:

Q. Mr. Alexander, with regards to this condominium, in your opinion, what way, if any, does the defects in the vapour barrier

contribute towards the deficiencies of water penetration and efflorescence.

A. I think that the incomplete vapour barrier allows warm humid air to escape to the cold side of the insulation. In winter time this creates a problem in that the water vapour in the warm air will condense on the cold side of the insulation and form lenses of ice that will subsequently melt during a period of warmer weather. The resulting water would tend to travel back into the building during times of the year when the ambient air temperature outside is above freezing point.

Then you have a problem - the problem of the warm humid air travelling on through the wall with the water, under certain conditions of temperature - exterior temperature, condensing in the exterior brick work and then it would evaporate to the outside as water, taking with it soluble salts which would be deposited on the outside surface as efflorescence.

Q. Mr. Alexander, did the plans call for a vapour barrier?

A. Yes

And further:

Q. Mr. Alexander, in your opinion, what is the solution to this cause of water penetration and efflorescence?

A. I think there is only one permanent solution and that is to restore the exterior masonry to the condition called for in the architectural and engineering drawings; namely, a solid masonry wall.

Q. Okay and now, to make it solid, what does that entail? Does that entail taking the bricks down and putting up the mortar and then putting bricks back up?

A. Well, it entails filling the cavity and it entails installing wall tiles if they are, indeed, missing. That has been establish at some locations - at the location of the tile. The only way that I can see to achieve that would be to take down the outer skin of brick and put it up again which is quite a horrendous undertaking.

Q. In terms of cost, what would it cost to do that?

A. We prepared an approximate cost estimate. I believe it was 1983 and at that time we came up with an approximate cost of about \$925,000.00. Today it would be higher than that.

Q. I'm sorry. Today, it would be what?

A. I said, today it would be higher than that - possibly, something in excess of \$1,000,000.00.

In a decision of December 18, 1984, the respondent dealt with the balcony leaks, as follows:

- 2) Regarding balcony related leaks, this matter as well was reported in the few units during the first year of registration. It is the Warranty Program's understanding of the problem that it is caused by the fact that the design calls for the masonry walls to rest on the structural, concrete floor slabs with no provisions in the design to prevent water entering the wall assembly from the higher surface of the balcony topping and, thus into the adjoining suite. (This condition is also contributing to the problem of efflorescence explained in Item 1).

Of the 40 units making up York Condo Corp 528, we are aware of 4 units which have such water entry problems.

[Emphasis added.]

In essence, the respondent dismissed all of the claims, except the efflorescence, on the basis that they were not made within the limitation period and refused to deal with the efflorescence on the basis that it had paid for cleaning off of mortar droppings, efflorescence, etc., associated with the original construction. The respondent further held that any further efflorescence that may have occurred was not a result of substandard workmanship or defective material, did not render the building unfit for habitation and did not result from construction not in accordance with the Ontario Building Code. With regard to the individual unit leaks, they refused to deal with these on the grounds that "the leaks are to the best of our knowledge due again to the failure of the design to anticipate water entry or the effect of the balcony drainage pattern".

When the matter came before the Tribunal, the Tribunal in their reasons repeated much of the correspondence that I have set out and the majority decision stated:

It will be noted that some of those letters were written to the vendor and developer, High City Holdings Ltd. As has already been indicated, it is our opinion that High City Holdings Ltd. was a rather villainous entity. Our opinion, further, is that Mr. Dade and Mr. Maling, by means of their letters, were endeavouring to persuade or otherwise induce High City Holdings Ltd. to somehow do its honourable duty by these unit holders and the Condominium Corporation upon whom it had fobbed or otherwise conveyed the results of its shoddy incursion into the construction field. The purpose of their letters to the abominable developer was without question an honourable purpose - simply, and on behalf of the present Appellant and the unit holders who are not parties to these proceedings, to induce it to remedy the perceived defects in its construction of this building. None of the interested parties to this appeal would have other than applauded their efforts, especially had they produced the results which they intended, that is, to have brought about the restoration or cure of the problems to which they referred. However, they didn't because the developer either wouldn't or couldn't undo its structural misdeeds before being overtaken

by nemesis. It is not clear to us whether this took the form of bankruptcy, the absconsion of its officers and principals, or just what, but, as appears, the High City entity has now, metaphorically speaking, disappeared from the screen.

This left Mr. Dade and Mr. Maling, like so many letter-writers before them, as well as their employer, the Warranty Program, in an ostensibly compromised and certainly embarrassing position. This was vis-a-vis the Appellant and the unhappy unit holders. Now the latter have taken the position that the Warranty Program is bound by their assertions or undertakings (set forth in the letters) as to the liability of the Warranty Program or by their assertions (in the letters) that the warranty, in the cases of these claimants, was viable.

We repeat, the indiscretions (as the Warranty Program has no doubt come to see them) contained in the Dade/Maling letters were intended to effect a good purpose. Equity, were it to come to some involvement in this issue (which it doesn't) would smile or at least look without disfavour upon that innocent fact at the outset. The claimants, both known and suspected in this case, now pin their hopes to the notion that the Warranty Program, having putatively accepted liability for these problems in that correspondence, and having done so in writing, is in fact liable. That notion, so logical and straight forward in the mind of any simple right-thinking non-specialist observer, especially one who perceived a substantial financial benefit from it, becomes significantly less so when passed through the mind of a lawyer. For those who have received the alleged advantage of a legal education will know that a warranty which was bestowed in the first instance by an Act of provincial parliament and which, upon the terms upon which it was created, has already expired, terminated lapsed and died, cannot be brought back to life by a mere letter, no matter how

well-intentioned or indiscreet. Parliament decreed that the warranty would die at midnight at the end of its first year of existence. Once dead, only Parliament can bring that warranty back to life. Nothing, no matter how well-intentioned and foolish, written or stated by an employee, agent or official of the Warranty Program can alter or impede the inevitable operation of an Act of the Provincial Legislature.

But equity presents a possible exception to that general rule. This is the doctrine of estoppel. Had the Warranty Program, by the letters to which exception has been taken, somehow induced the applicant of any other claimants to sustain a detriment in reliance upon the assertion set out in the letters referred to, then, on the authority of the rule in Re: Wentworth Condominium Corporation No. 45, a Ruling released by the Tribunal April 17th, 1985, the Respondent would have been estopped from relying on Section 15 of the Act and from maintaining that the warranty had expired when the claim was made.

But that is not the case in this instance. Neither the Appellant nor any of the unit holders (who are not parties to this appeal) suffered any detriment springing from any reliance they may have placed upon the Respondent's letters. This was because their rights under the Warranty were already dead when the first of such letters went out. He who lies on the ground cannot fall. He who is already dead cannot be slain. He whose rights are already dead cannot sustain a detriment - other than disappointment - from the communication to him of erroneous information, no matter how well- or ill-intentioned. Consequently, the Dade/Maling letters upon which the Appellant has placed some reliance and which are no doubt of considerable embarrassment to the Respondent are of no effect at law. And that is why this appeal in respect to the bulk of the claims to which it relates must fail.

We feel that it must go without saying that we have a very great deal of sympathy with the Appellant and the unit holders who are involved in this unfortunate matter. We wish them well in whatever further proceedings they may decide to undertake elsewhere. We are very pleased to be able to allow them the relief referred to in respect of the cleaning or repairing of the efflorescence, referred to above, as well as to the crack to which mention has been made.

We agree that they are the victims of a "raw deal" from the vendor. However, we are unable to find that the Ontario New Home Warranties Plan Act, save as to the extent mentioned, is available as a tool to help them.

The minority decision found, with regard to the balconies:

Since this problem was admittedly communicated to the ONHWP within the first year of registration, the ONHWP has a responsibility to repair the problem balconies to prevent further water penetration.

In addition to the letters which have been referred to that were written by the respondents, the respondents actually attempted to correct the wall deficiencies by filling the wall cavity to turn the wall into a solid wall. These efforts, however, were unsuccessful.

The Tribunal may well have been correct in their view of the estoppel argument with regard to the letters. Even the wall repairs undertaken might not support a finding of estoppel. Because of my views on the limitation period itself, it is not necessary to determine this issue.

In addition to the officers of the Condominium Corporation and some of the unit owners, two experts testified at the hearing before the Tribunal. The Condominium Corporation called on Mr. Alexander on their behalf and the respondent's expert was Mr. Tibor Pal. Neither Mr. Ray Dade nor Mr. Robert Maling, who had written the various letters on behalf of the respondent testified with regard to why these letters were written or why they had undertaken certain work to correct the wall deficiencies. The Tribunal's findings with regard to the motives of Mr. Dade and Mr. Maling were apparently based on reasons given by the respondent in its initial decision and on argument presented by counsel at the hearing.

Credibility

Normally, in an appeal such as this, it is not essential to determine credibility since the findings with regard to credibility of the Tribunal who saw the witnesses and their demeanour would be preferable. However, as the Tribunal did not make findings of fact in a number of areas because of their decision on the limitation period, it is necessary to review the evidence and determine questions of credibility. In doing so, I have considered the Tribunal's remarks praising Mr. Alexander and their obvious respect for his opinion. The only question of credibility before the Tribunal and before us arises in comparing the evidence of Mr. Alexander and Mr. Pal. The Tribunal obviously preferred the evidence of Mr. Alexander and in effect confirmed his evidence by their findings with regard to the workmanship in the project. This is also shown by the chairman's attitude towards the evasive answers given Mr. Pal on many occasions. At one point after the chairman had directed a question to Mr. Pal, he commented on the answer as follows:

THE CHAIRMAN; That's an awfully evasive answer to my question. It, certainly, doesn't apply that you've been listening to it for focusing your attention on my question. I don't understand how a person can answer a simple question in such an evasive manner.

Having reviewed the evidence of Mr. Alexander and Mr. Pal, I accept the evidence of Mr. Alexander over that of Mr. Pal with regard to the problems in this building.

With regard to the finding by the respondents that the balcony problem was caused by improper design and not by faulty workmanship, I accept the evidence of Mr. Alexander, which was as follows:

Q. ... Do those failures to build that balcony as shown in the drawings, in any way, contribute to water penetration?

A. Well, I think that all of those factors contribute to water penetration.

Q. If the balconies had been built as shown on the drawings and had all the things that they should have, would there be any water penetration?

A. From the balconies, no.

Mr. Alexander estimated the cost of restoring all of the balconies to a sound condition to be slightly in excess of \$200,000.

Decision

During the one-year limitation period, the respondent knew that there was water penetration into the building that was complained of in a number of ways. In addition to the deficiency lists submitted, it was advised in writing by various unit owners that water was coming into their units. Since the balconies were common elements and the walls were also common elements, the water could only be entering through common elements. The Condominium Corporation for the purposes of this appeal, and in accordance with the relevant statutes are deemed to be the owners of the common elements, although in actual fact the unit owners own the common elements as tenants in common.

The notices did not specify the cause of the water penetration or the efflorescence. The notices in some cases specified remedies, such as cleaning, and causes, such as leakage through the balcony above. Nevertheless, the notices were satisfactory so long as they indicated the symptoms of the problem which they did. While the language was not what might be desired with hindsight, the respondent knew well within the one-year limitation period that there was a problem of efflorescence on the walls and that there was water penetration into the structure in various places. There is no evidence that indicates whether or not the leakage in the garage is connected to the wall defects. However, the garage is part of the main structure and is protected by the same walls as the units but at a different level. Accordingly, water penetration into the garage, which is clearly indicated in some of the deficiency lists, is on the balance of probabilities a result of the same defects as the water leakage in other parts of the structure which is indicated by the efflorescence on the outside of the structure. The pictures of the efflorescence show that the efflorescence is at all levels of the structure, including the wall of the garage. It would be impractical and unfair to expect the unit owners and the Condominium Corporation to advise the respondents within the one-year period not only of the symptoms of the problem but the cause of the problem and the appropriate method of correcting the defects.

In actual practice as happened in this case, the symptoms were noted, extensive investigations were undertaken, including opening up the wall, some methods of repair were attempted, such as the adding of flashing to the point where the balconies attach

to the structure. It is only through this type of inspection, consultation with experts, and trial and error with regard to attempted remedies, that the appropriate method of correcting the deficiencies can be determined.

Accordingly, I would set aside the decision of the Tribunal and in its place I would give judgment in favour of the appellant against the respondent for \$762,287.04, plus interest at 12 percent per annum from the date of the respondent's original decision in this matter, namely October 21, 1985, at which time it should have granted the application and either performed the repairs or paid the balance of its guarantee, which is limited to \$20,000 per unit less the amount that it had previously expended, which net amount is \$762,287.04. The appellant shall also have its costs of these proceedings.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

HUGHES, RUTHERFORD and STEELE, JJ.

B E T W E E N:

ALLEN FRANK ARNOLD and
RAYMOND PAUL WILSONApplicants
(Respondents)

- and -

THE REGISTRAR OF REAL ESTATE
AND BUSINESS BROKERSRespondent
(Appellant)Dennis W. Brown,
for the appellantsAustin M. Cooper, Q.C.,
for the respondentsHeard: June 13, 14 and 17, 1977.HUGHES, J.: (Orally)

The issues in this appeal must be set against the background of a period of active speculation in the value of house property particularly in Toronto taking place in 1973 and early 1974, a stop to which was put by the enactment of the Land Speculation Tax Act, 1974, S.O. 1974, c.17. As a result of complaints by members of the public, the Registrar of Real Estate and Business Brokers proposed to revoke the registration under the Real Estate and Business Brokers Act, R.S.O. 1970, c.401, as amended by 1971, c.50, s.76; 1972, c.1, s.53, of two registrants, Allan Frank Arnold, who was registered as a broker, and Raymond Paul Wilson as a salesman. The proposal cited a number of grounds in accordance with the provisions of the statute under s.9(1) for revoking their registration. It is not necessary, we think, to recite all of them. There were some thirty transactions in which the respondents engaged and six were considered in detail by the Commercial Registration Appeal Tribunal to which the respondents applied as they were entitled to under s.9(4). That sub-section and sub-section (5) are as follows:

9.-(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing

and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 9 applies to s.8 which reads:

8.-(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if he were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 6(1)(b) has been cited in the course of this appeal and reads:

6.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

...

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

I shall return to the governing statute a little later, but for the time being it is only necessary to look at the Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c.113. This

was formerly, I think, the Department of Financial and Commercial Affairs Act, R.S.O. 1970, c.113 and into it was imported by the Civil Rights Statute Law Amendment Act, 1971, 20 Eliz.II (1971) c.50, s.9(b) the following provisions:

9B.-(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the Supreme Court in accordance with the rules of court.

(2) Where any party appeals from a decision of the Tribunal, the Tribunal shall forthwith file in the Supreme Court the record of the proceedings before it in which the decision was made, which, together with the transcript of the evidence if it is not part of the Tribunal's record, shall constitute the record in the appeal.

Then there follows a provision that the Minister may be heard and finally sub-section (4) provides -

(4) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper.

That is how the appeal of the Registrar comes before us, and sub-section (4) encompasses our jurisdiction. I will now turn to what happened before the tribunal.

It sat in the summer months of 1975 and in September handed down its decision dealing with the course of conduct pursued by Arnold and Silson which was the subject of the proposal of the Registrar. The two respondents who were before it as applicants were cousins, Arnold, the broker, being an officer and employee, and Wilson, the salesman, being an employee of a company called Aloï Brothers Limited engaged in the real estate business. The tribunal dealt with at least six examples of the transactions which the Registrar had cited in his proposal and made certain findings of fact and indeed of law, facts as to what they had done and law as to the statutes and principles which they had violated in the opinion of the tribunal. One of the symptoms of the speculative

fever, of course, was that houses were passing from hand to hand in 1973 particularly upon resale and the vendors were making capital gains which were attractive. In order to encourage sales, the respondents, in company, as it is perfectly clear with a great many other people, were in order to put cash in the hands of the vendor, offering to procure second mortgages to be given by a purchaser to the vendor and then to be sold at a discount to a mortgage broker for cash. In the course of promoting this not unreasonable solution, the respondents were found to have taken on numerous occasions a commission from the mortgage broker, two in particular, Confirmed Investments and Renoir Investments. In addition to that they - I say "they", and perhaps I should say this about it - only Wilson gave evidence before the tribunal and it was agreed that the fact that Arnold did not in any way prejudice him. Wilson testified on behalf of both and the tribunal took the logical position that they were both equally guilty so they are generally dealt with as a couple. They were found to have participated themselves and through a confederate in the reselling of property, and the tribunal examined one transaction in particular involving the sale of 120 Beverly Glen Boulevard. Vendors by the name of Hayward sold to one Hedges at a price of \$41,000 in November, 1973 and in February, 1974 Hedges sold to Nawmann for \$45,500 and in March, 1974 Nawmann sold to Soberano for \$49,500. On all of these three transactions both the respondents received commissions from their own broker, and in addition each got a commission of \$275 on the original second mortgage obtained and discounted with Renoir Investments. It turned out, of course, that Hedges was a confederate of the respondents and had previously bought a property through them and had become interested in this apparently easy way of making money. No disclosure was made to the Haywards of the fact that the respondents obtained a few for obtaining and discounting the second mortgage or as to the subsequent re-sale. The tribunal found that there was nothing unlawful about the respondents not having come round to the Haywards and pointed out that their property was going like a hot cake and had been re-sold and for how much, but did find, of course, that the taking of the finder's fee on the second mortgage was improper and in breach of s.41 of the statute which reads:

41. No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer.

It may be noted here that a "trade" is defined in s.1(m) of the statute and the definition would not appear to embrace what was done by the respondents but the tribunal went on to find that this was a breach of their fiduciary duty as agents of the vendors in not disclosing the fact that they had received commissions. It is interesting to observe that the Haywards were more distressed by the fact that their property had been re-sold rapidly and at an escalating price than anything else, and the tribunal took the view that the respondents were not offenders simply by not disclosing that. What did develop from this particular transaction - and it is the most complex one that was considered - was an allegation based upon an investigation by the Registrar's office that the respondents had split the profits of the two subsequent sales with Hedges. This was emphatically denied by Wilson in his evidence, but he was confronted, on re-opening his cross-examination, with certain evidence evidently discrediting him in the eyes of the tribunal, which came to the conclusion that Hedges was telling the truth when he admitted that he had split the profits three ways, that is a third to himself and a third each to the respondents.

There was a preliminary to this particular transaction in another purchase by Hedges and his fiancée of 35 Princemere Crescent, and this was the transaction which introduced Hedges to the respondents. Subsequently the two fell out and the fiancée, a Mrs. Quintele, gave some evidence damaging to the respondents about the obtaining of a signature to a disclosure statement as to one Rosenberg, purchaser from them shortly after, being a real estate broker. Wilson testified that Hedges had, when asked, given his consent to Wilson signing his name to an acknowledgment of this necessary revelation. The requirement for Mrs. Quintele signing the statement also was overlooked for a period of a year; then strenuous efforts were made to get her to sign and she did. However, it was made to appear on the disclosure statement that she signed in September, 1973 when Hedges signed and the tribunal in that case found that the respondents here furnished false information required to be furnished under the Act as to the date, signature and witnessing of the statement, since in addition to signing Hedges' name, Wilson purported to witness his signature. In our view the tribunal might very well have taken a much stricter view of this transaction than it evidently did. I have spent some time upon this because I think this is the major transaction of all the ones that were dealt with by it.

The next one involved a property called 10 Linda Way. The vendor was a Mrs. Ecclestone, and the tribunal found that this was a transaction in which Wilson himself evidently was the purchaser for re-sale. It held that s.42(1) of the statute had been contravened.

42.-(1) No broker or salesman shall purchase, lease, exchange or otherwise acquire for himself or make an offer to purchase, lease, exchange or otherwise acquire for himself, either directly or indirectly, any interest in real estate for the purpose of resale unless he first delivers to the vendor a written statement that he is a broker or salesman, as the case may be, and the vendor has acknowledged in writing that he has received the statement.

No such statement was offered or, of course, acknowledged in this case.

Then there was an example of another practice which the board found reprehensible in connection with the sale of 3435 Joliffe Avenue, Unit 67. Here the offer to purchase was made by Wilson's sister-in-law, one Carol Millson. This fact of course which facilitated the re-sale of the property at a profit to the respondents was not disclosed, and the tribunal found that there had been a contravention of s.41 and of s.35(c) which reads:

35. No broker or salesman shall as an inducement to purchase, sell or exchange real estate, make any representation or promise that he or any other person will,

...

(c) procure a mortgage, extension of a mortgage, lease or extension of a lease;

unless at the time of making the representation or promise the broker or salesman making it delivers to the person to whom the representation or promise is made a statement signed by the broker or salesman clearly setting forth all the details of the representation or promise made.

It is fair to say that such a representation was in other cases made by the respondents, but in this case it was either overlooked or not considered politic.

There followed transactions in which Arnold's mother-in-law and Wilson's sister were used in the role of purchasers for undisclosed re-sales and I will not mention them specifically. The

tribunal deals with them faithfully in the course of its 40-page decision. The Registrar's notice of appeal contains various averments about the failure of the tribunal to consider evidence in cases which it did not specifically describe and discuss. The grounds of appeal are numerous, but as Mr. Cooper has pointed out for the respondents, what it all amounts to in the end is an appeal against sentence. It is not now alleged, I take it, that the tribunal erred in its findings although an assertion that the tribunal had failed to find "unjust enrichment" was contained in the notice. This is all to the good because unjust enrichment has nothing to do with this case.

Before turning to the disposition of the application by the tribunal, I must refer to one more finding in its consideration of the transaction involving 340 Sprucewood Court, Unit 70. Its decision reads in this respect:

The Tribunal finds in this transaction, as well, that the applicants failed in their fiduciary capacity to inform Mr. and Mrs. Perks as to their mortgage commissions and the fact that the purchaser was Wilson's sister. This could have alerted the Perks as to the potential value of their property, since the closing date was not until March 29, 1974. Likewise the applicants contravened section 41 of the Act.

That was the last transaction commented on by the tribunal which then went on to make some general findings:

The Tribunal finds on this evidence that the Applicants were either acting for the vendors and did not disclose the commissions they received or they were acting for the mortgage brokers who paid them a commission and in either case they were breaching their fiduciary relationship with the vendors by not disclosing the commissions received.

There follows a reference to the well-known case of Charles Baker Limited v. Baker & Baker, [1954] O.R. 418 in which J.K.Mackay, J.A. for the Court of Appeal stated the law governing the fiduciary relationship between a principal and agent. Then there was a finding that the respondents' conduct fell under the provisions of s.6(1)(b) as to integrity and honesty and in these terms:

The Tribunal is therefore afforded reasonable grounds for belief that the applicants did not

carry on business in accordance with law or with integrity.

It was not urged upon us by Mr. Brown as it might well have been that this was enough to warrant, as proposed by the Registrar, cancelling permanently the registrations of both these men, but from that rather devastating finding the tribunal went on to order the suspension of their registrations for a period of two months and to impose certain conditions in these terms:

...on the expiry of said period of suspension shall be subject for one year to the following terms and conditions, the breaching of which shall immediately result in revocation of their respective registrations at the time of such breach:

1. The Applicants shall comply strictly with the provisions of the Act and its regulations particularly sections 41, 42, and 35(c) of the Act;

2. The applicants shall not be engaged in a proven course of conduct relating to a trade in real estate which is contrary to the fiduciary duties imposed upon them as agents and by the law of agency to act in the best interests of their principals;

3. The Applicants shall not be the subject matter of any proven complaint received by the Respondent concerning their conduct that is relevant to their fitness to continue as registrants;

4. The Applicants shall not contravene the Criminal Code of Canada or any other statute in any jurisdiction that is relevant to their fitness to act as registrants; and

5. The Respondent and/or his staff shall have the right to inspect the books, papers and documents relevant to trades in real estate by the applicants or any one of them, as agents or broker, to ensure strict compliance with the terms and conditions aforesaid.

The general ground on which we would approach the decision of this tribunal, or any other tribunal in like position,

is set out by this court in Re Western Ontario Credit Corp. Ltd. and Ontario Securities Commission, 9 O.R.(2d)93. I was referred by Mr. Cooper to my own judgment the gist of which is thus expressed at p.103:

Moreover, where a regulatory tribunal, acting within its jurisdiction, makes an order in the public interest with the experience and understanding of what that interest consists of in a specialized field accumulated over many years, the Court will be especially loath to interfere.

I think that applies to this case. For example, in connection with the mortgage finder's fees, the tribunal said it was aware of the bad practice in the industry prevailing at the time and had taken that into account as a factor favourable to the respondents, as well as their youth and short exposure to the real estate business up until their falling foul of the Registrar. It also took into account the fact that between the time of the transactions under review and the time of the hearing in 1975, the conduct of the respondents had given rise to no complaints. Much latitude must therefore be given, in our view, to a regulatory tribunal trying to create examples of proper conduct in an industry under its supervision without making horrible examples of certain individuals. It is quite clear that it decided not to be too hard on the respondents and we would not be disposed to allow this appeal in any form had it not been for what appear to be probationary provisions contained in the penalty imposed. With the exception of paragraph 5 of the portion of the reasons dealing with the penalty which I have quoted and paragraph 1 or that part of the order dealing with the suspension, we think that all the intermediate stipulations are erroneous in principle. It must be clear that an injunction to obey the law is not a penalty and I should go further and say that by making stipulations as to obeying the law and then saying that if the respondents did not they would forthwith lose their registrations, deprives the tribunal of the discretion which it should properly exercise in establishing a penalty should the respondents or either of them come before it a second time.

Another case was cited to us in this connection by Mr. Cooper and that was Re Registrar of Used Car Dealers and Salesmen and Robert Rowe Motors Ltd. et al., [1973] 1 O.R. 308. The Court of Appeal did substitute its opinion for that of the tribunal by imposing a different and heavier penalty where the tribunal had imposed conditions amounting to probation described in these words:

...we hereby suspend the revocation of the registration of Robert Rowe Motors Limited as a dealer and Robert Hugh Rowe as a salesman during a probationary period ending December 31, 1972, provided:...

and in terms quite similar to what the tribunal did in the case before us, Arnup, J.A., giving the judgment of the court of appeal, said this at the bottom of p.309:

It was doubtless because of the restricted choice of the type of order that the Tribunal may make that this rather unusual form of order was made. There are no provisions in the statute for putting a dealer or a salesman on probation with appropriate terms, and this appears to us to have been an attempt by the Tribunal (and we can understand why they wished to do so) to impose a form of probation, but within the framework of the statute itself.

It is important to observe that the learned justice of appeal cited s.17 of the Used Car Dealers Act, R.S.O. 1970, c.475 which is in many respects similar to the provisions of s.9 of the Real Estate and Business Brokers Act and reads as follows:

- 17(1) The Tribunal may, after the hearing,
- (b) where the hearing is an application for suspension or revocation of a registration, dismiss the application or order that the registration be suspended or revoked and the tribunal may attach such terms and conditions to its order or to the registration as it considers appropriate.

The words "for carrying out the purposes of this Act" are omitted, but it will be seen that, even in the face of that sanction to attach terms or conditions considered appropriate, the Court of Appeal held that there were no provisions for a probationary order in the statute, and we are of the same opinion as far as the Real Estate and Business Brokers Act is concerned. However, since the Court of Appeal in Rowe's case over-rode as it were the tribunal's disposition and imposed a three-month suspension, this case is not as helpful as it might be, and I particularly allude to the following words on p.312:

In view of the order which we are making, we do not find it necessary to decide whether, having regard to its statutory powers quoted

above, the Tribunal has the power to make the kind of order which it made.

I register a mild and deferential complaint that those words are in some respects inconsistent with the observation that I read before as to the lack of any statutory power.

The only other point arising from this case which is of importance to our disposition of this appeal is to be found in the statement of Arnup, J.A. on p.311 that:

...the circumstances under which this Court exercises its jurisdiction on an appeal from a judge of the High Court sitting without a jury are well known and the principles on which the jurisdiction is exercised have been settled for many years.

That is a reference to the fact that s.3 of the Used Car Dealers Act provided, unlike s.9b(4) of the Ministry of Consumer and Commercial Relations Act, for the court exercising the same powers as on an appeal from a judge of the High Court sitting without a jury. It does not provide for that remission which the Ministry of Consumer and Commercial Relations Act provides for in 9b(4) contained in the words "or the court may refer the matter back to the Tribunal for rehearing, in whole or in part, in accordance with such directions as the court considers proper". This is what we propose to do. The matter will be referred back to the Commercial Registration Appeal Tribunal for a re-hearing as to the penalty imposed only, and the re-consideration by the tribunal of its penalty, bearing in mind that in our opinion the probationary provisions are unlawful. We could hardly do otherwise in view of what fell from Arnup, J.A. in the Rowe case and the tribunal will be asked to impose, if it sees fit, a different penalty if the terms and conditions imposed were regarded as penal when the order was made.

It is all the more convenient to remit this matter to the tribunal because it must in any event name the specific months during which the suspension would operate if that is its conclusion. We note it had already varied its order in that respect once, and had ordered a stay of the effect of any order until this appeal has been disposed of. We confirm that stay and extend it to cover any period during which the tribunal may re-hear the matter of penalty which has been remitted to it.

We have heard argument by counsel on the question of costs and although it is true that the Registrar, the appellant in these proceedings, has to some extent succeeded, the success of the

respondents has been substantial. However, it would not, in our view, be proper to award the respondents their costs in this matter in view of the circumstances of the case, and to give the Registrar his after such protracted proceedings, already most costly for the respondents would be oppressive. There will be none ordered.

Dated: 23rd June, 1977.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

LERNER, GOODMAN and WEATHERSTON, JJ.

IN THE MATTER OF The Real Estate)	
and Business Brokers Act, R.S.O.)	
1960, Chapter 344 as amended and	)	<u>B. Burton</u>
the regulations thereunder	)	for the applicants
	)	appellants
AND IN THE MATTER OF The Real)	
Estate and Business Brokers Act,)	
R.S.O. 1970, Chapter 401, as)	
amended by the Civil Rights	)	<u>R. Lundy</u>
Statute Law Amendment Act, R.S.O.	)	for the respondent
1971, Chapter 50 and the)	
regulations thereunder)	
)	
AND IN THE MATTER OF)	
)	
AXLER & PALMER LIMITED and)	
JOSEPH L. AXLER	)	Heard: January 30th and
	)	31st, and February
Applicants	)	<u>3rd, 1975</u>
Appellants)	
)	
- and -)	
)	
THE REGISTRAR OF REAL ESTATE)	
AND BUSINESS BROKERS)	
)	
Respondent)	

LERNER, J. (Orally)

This is an appeal by the applicants, who are two real estate brokers, from the decision of the Commercial Registration Appeal Tribunal pronounced June 26th, 1973, which directed that The Registrar of Real Estate and Business Brokers suspend the registrations of both applicants for a period of one year. The Tribunal also laid down terms and conditions to be effective after the registrations were restored following the year of suspension. The terms of these conditions were:

(1) The Registrar or any person designated by him in writing shall for an additional period

of one year from the expiry of the aforesaid suspension have the right to enter upon the business premises of the applicants at any reasonable time and shall be entitled to full and complete access to all books, bank accounts, vouchers, accounts, correspondence and records of every description and nature without restriction of any kind whatsoever and

(2) The Applicants shall not contravene any of the provisions of The Real Estate and Business Brokers Act, R.S.O. 1970, Chapter 401, as amended, or the regulations made thereunder, or commit an offence under the Criminal Code of Canada or under any law of any jurisdiction that is relevant to their fitness for registration under the said Real Estate and Business Brokers Act.

Following its decision, the Tribunal made an order on July 23rd, 1973, staying the suspension of the registrations but continuing the conditions, as set out above, pending the disposition of this appeal.

The hearing before the Tribunal was by way of an appeal from the decision of The Registrar of The Real Estate and Business Brokers Act dated October 2nd, 1972, by which he had revoked the registrations of the appellants as real estate brokers pursuant to sections 6(1)(c), 6(1)(d), 8(2) and 9(1)(2)(3) of The Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, as amended by The Civil Rights Statute Law Amendment Act, S.O. 1971, c.50.

Section 76(2) of The Civil Rights Act replaced section 9 of The Real Estate and Business Brokers Act, which dealt with hearings by a Tribunal from the Registrar's rulings, with a more comprehensive section which provides for a hearing in certain circumstances before the Tribunal.

Section 1(n) of The Real Estate and Business Brokers Act defines "Tribunal" as:

'Tribunal' means The Commercial Registration Appeal Tribunal established under The Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c.401, s.1, amended by 1971, c.50, s.76(1) and 1972, c.1, s.53(1) and (2).

Under The Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c.113, as amended by S.O. 1972, c.1, s.23(1), the

Minister is responsible for, inter alia, the administration of The Real Estate and Business Brokers Act.

Section 9b(1) of The Ministry of Consumer and Commercial Relations Act states:

Any party to proceedings before the Tribunal may appeal from its decision or order to the Supreme Court in accordance with the rules of Court.

Subsection (2) sets out what shall be filed by way of record, and subsection (4) defines the powers of the Court on appeal as:

An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the Court may substitute its opinion for that of the Registrar or of the Tribunal, or the Court may refer the matter back to the Tribunal for a re-hearing, in whole or in part, in accordance with such directions as the Court considers proper.

The Judicature Act, R.S.O. 1970, c.228, as amended, provides in s.17(1)(a):

The Divisional Court has jurisdiction to hear, determine and dispose of,

- (a) all appeals to the Supreme Court under any Act other than this Act and The County Courts Act;

We have set out the pertinent statutory powers because it appears that they have not heretofore been spelled out in any reasons for judgment, nor in the memorandums of fact and law in this appeal. It required research to make certain that this appeal was properly before the Court.

The jurisdiction as I have spelled it out, is limited to matters commenced after April 17th, 1972 and these proceedings were initiated after that date.

As required by s.9(1) of The Real Estate and Business Brokers Act the Registrar gave the applicants notice with his reasons and the particulars upon which they were founded.

It is clear from the admissions made by Joseph Axler at the Tribunal hearing and by counsel on behalf of both applicants before this Court, that the particulars as set out in paragraph 2(a), (b) and (c); paragraph 3 and paragraph 4 all of exhibit 2 and the evidence led on those particulars was sufficient to support the findings of fact made by the Tribunal.

Without discussing the evidence and the reasons of the Tribunal in any detail on the other particulars, we find that there was evidence to support the Tribunal's further findings of irregularities that were sufficient, in our opinion, to invoke the provisions of s.6 of The Real Estate and Business Brokers Act. Section 6(1)(b) states:

6.-(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty;

This was properly considered with respect to Joseph Axler. Counsel in an able and exhaustive argument, inter alia, relied heavily on the fact that no client suffered any loss. Proof of an actual loss is not always the necessary criterion. If the conduct as revealed by the evidence was allowed to continue without strictures and punishment, much of the effect of the pertinent legislation would be lost. Prevention of possible harm to the public is as important as punishment for a fait accompli.

With respect to the corporation, Axler & Palmer Limited, s.6(1)(c)(ii) states:

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;

Again, we find that the decision of the Tribunal was warranted by the evidence which unquestionably indicates an offence against this subsection.

On the matter of the penalties imposed, it was argued for the appellants that they were out of proportion to the offences in their severity and not consistent with the penalties fixed by the

Tribunal on May 8th, 1974 in the matter of Raymond Vint and Barbara Elias, applicants and The Registrar of Real Estate and Business Brokers as the respondent.

Each case depends on its own facts. It is not our intention nor our function to be party to setting up what would amount to be a schedule or scale of penalties. To be guided by what was done in that case would be setting an undesirable precedent. It may be that the penalties in that case were too lenient in the circumstances rather than the penalties too high in the case at bar. The cumulative effect of the course of conduct of the applicants in carrying on their business and particularly with respect to the irregularities in connection with the trust accounts of Axler & Palmer Limited and the issuing of postdated cheques fully warrant the penalties.

Joseph Axler appears from the evidence to be a sophisticated businessman, some of whose answers under oath before the Tribunal were justifiably criticized as lacking credibility. He attempted to demonstrate a naivete that did not fit in with his business acumen as demonstrated by his involved transactions.

It is our view that Axler & Palmer Limited was used often as a vehicle to carry out real estate transactions for other companies in which Joseph Axler had an involvement or operated, than the legitimate business of a real estate broker, which this Act is designed not only to regulate but to protect from unfair practices on the part of the public as well as unfair practices on the part of brokers and salesmen.

If these penalties are substantial, they will conceivably serve as a deterrent to other real estate brokers who are more concerned with serving their own real estate operations than the public who come to them to find purchasers or vendors of real estate.

The appeal, both as to conviction and penalties, is therefore dismissed with costs. The order dated July 23rd, 1973 staying the suspension of the licences is forthwith revoked.

On the cross-appeal, we are all of the opinion that while there may have been evidence available, it was not before the Tribunal to warrant a finding that the four salesmen were salesmen of Axler & Palmer Limited and therefore requiring to be registered pursuant to s.5(f) of the Act. The same observations apply to the evidence adduced with respect to the sale of the Adams property. The cross-appeal is therefore dismissed without costs.

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTVan Camp, White, Fitzpatrick

IN THE MATTER OF the Real Estate)
and Business Brokers Act;)

AND IN THE MATTER OF the)
Ministry of Consumer and)
Commercial Relations Act;)

M. W. Bader,
for the appellant

AND IN THE MATTER OF the)
Registration of Jan Brandejs)
as a real estate salesman)
pursuant to the Real Estate and)
Business Brokers Act;)

no one appearing
for the respondent

AND IN THE MATTER OF the)
Proposal of the Registrar of)
Real Estate and Business Brokers)
made pursuant to Section 9(1) of)
the Real Estate and Business)
Brokers Act to revoke the)
registration of Jan Brandejs,)
Proposal dated the 14th day of)
January, 1983;)

AND IN THE MATTER OF a)
requirement for a hearing)
respecting the said Proposal)
made pursuant to Section 9(2),)
Requirement dated the 18th day)
of January, 1983;)

B E T W E E N;)

JAN BRANDEJS)

Appellant)

- and -)

REGISTRAR OF REAL ESTATE AND)
BUSINESS BROKERS)

Respondent)

Heard: February 21, 1985

ORDER

UPON motion made this day by way of an appeal by Jan Brandejs from the Decision and Order of the Commercial Registration Appeal Tribunal dated the 15th day of August, 1983, and upon hearing read the Decision and Reasons of the Commercial Registration Appeal Tribunal and what was alleged by counsel:

1. IT IS ORDERED that the application be and is hereby dismissed.

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

THE HONOURABLE THE CHIEF JUSTICE) TUESDAY, THE 19TH DAY
 OF THE HIGH COURT)
THE HONOURABLE MR. JUSTICE FRASER) OF JUNE, 1973.
THE HONOURABLE MR. JUSTICE HOLLAND)

IN THE MATTER OF The Judicial Review Procedure Act,
1971, S.O. 1971, c.48;

AND IN THE MATTER OF The Statutory Powers Procedure Act,
1971, S.O. 1971, c.47;

AND IN THE MATTER OF a pending hearing before the
Commercial Registration Appeal Tribunal pursuant to
Section 9 of The Real Estate and Business Brokers Act,
R.S.O. 1970, Chapter 401 as amended.

Re: The Real Estate and Business Brokers Act, R.S.O.
1960, Chapter 344 as amended and the regulations
thereunder

- and -

Re: The Real Estate and Business Brokers Act, R.S.O.
1970, Chapter 401 as amended by The Civil Rights Statute
Amendment Act, S.O. 1971, Chapter 50 and the regulations
thereunder

- and -

Re: Cambrian Realty Corporation Limited, Regis Moreau,
David Wickett, present registered real estate brokers

- and -

Re: The Ross A. Shouldice Company Limited, a registered
real estate broker, predecessor of Cambrian Realty
Corporation Limited.

O R D E R

UPON the application on behalf of Cambrian Realty Corporation Limited, Regis Moreau and David Wickett for a judicial review of the decision of The Commercial Registration Appeal Tribunal to proceed with a Hearing, for an Order in lieu of prohibition to prevent the said Hearing and for a declaration that in the circumstances the said Tribunal lacks jurisdiction to engage in a Hearing, upon hearing read the proceedings herein, the Affidavit of Regis Moreau and the exhibits attached thereto, filed, and what was said by counsel on behalf of the Applicants and on behalf of The Registrar, The Real Estate and Business Brokers:

1. THIS COURT DOTH ORDER AND ADJUDGE that the Commercial Registration Appeal Tribunal be and the same is hereby prohibited from further proceedings in the within matter.
2. THIS COURT DOTH FURTHER ORDER AND ADJUDGE that there be no costs of these proceedings.

A.P. Bridges
Assistant Registrar
Supreme Court of Ontario

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

Wells, C.J.H.C., Fraser and Holland, JJ.

IN THE MATTER OF The Judicial)	
Review Procedure Act, S.O.)	
1971, C.48;	)	<u>C. L. Campbell</u> , for the
	)	applicants Cambrian Realty
AND IN THE MATTER OF The	)	Corporation Limited,
Statutory Powers Procedure Act	)	Regis Moreau, and
1971 (S.O. 1971, c.47);	)	David Wickett;
)	
AND IN THE MATTER OF a pending	)	<u>B. Wright</u> , for the
hearing before The Commercial	)	respondent, Registrar,
Registration Appeal Tribunal	)	Real Estate and Business
pursuant to Section 9 of The	)	Brokers.
Real Estate and Business Brokers)	
Act, R.S.O. 1970, Chapter 401)	
as amended.	)	No one appearing for
	)	Registrar, Commercial
Re: The Real Estate and Business	)	Registration Appeal
Brokers Act, R.S.O. 1960, Chapter	)	Tribunal.
344 as amended and the regulations)	
thereunder.)	
	)	No one appearing for
- and -	)	Attorney General for
	)	the Province of Ontario
Re: The Real Estate and Business)	
Brokers Act, R.S.O. 1970, Chapter)	
401 as amended by The Civil Rights)	
Statute Amendment Act, S.O. 1971,)	
Chapter 50 and the regulations)	
thereunder.)	
- and -	)	Argued: June 7th, 1973.
)	
Re: Cambrian Realty Corporation)	
Limited, Regis Moreau, David)	
Wickett, present registered)	
real estate brokers.)	
)	
- and -)	
)	
Re: The Ross A. Shouldice Company)	
Limited, a registered real estate)	
broker, predecessor of Cambrian)	
Realty Corporation Limited)	

HOLLAND, J.

This is an application on behalf of Cambrian Realty Corporation Limited, Regis Moreau and David Wickett for a judicial review of the decision of the Commercial Registration Appeal Tribunal to proceed with a hearing, for an order in lieu of prohibition to prevent the said hearing and for a declaration that in the circumstances the said tribunal lacks jurisdiction to engage in a hearing.

Regis Moreau, David Wickett and Cambrian Realty Corporation Limited were at all material times prior to April 30th, 1973, registered as real estate brokers under the Real Estate and Business Brokers Act. The expiry date of such registrations was April 30th, 1973. By a notice dated December 28th, 1972, the Registrar of Real Estate and Business Brokers purported to revoke the registrations of Regis Moreau, David Wickett and Cambrian Realty Corporation Limited. This revocation was purportedly pursuant to sections 6 (1) (c), 6 (1) (d), 8 (2) and 9 (1), (2) and (3), of Real Estate and Business Brokers Act, R.S.O. 1970, C 401. By section 6 (1) (a) of that Act an applicant is entitled to registration or renewal of registration except where his financial responsibility or record of past conduct is such that it would not be in the public interest for the registration or renewal to be granted and certain other exceptions are referred to in that section. Certain restrictions are also imposed in registration of broker corporations by virtue of section 7 of the Act. Sections 8 and 9 (1) of the Act read as follows:-

"8. (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2). Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under he shall serve notice of his proposal, together with written reasons therefor, on the applicant or registrant."

It is to be noted that the power of the Registrar under section 8 (2) of the Act to Revoke a registration is subject to the provisions of section 9.

Upon receiving a copy of the notice above referred to Regis Moreau, David Wickett and Cambrian Realty Corporation Limited instructed their solicitors to file a notice requesting a hearing before the Commercial Registration Appeal Tribunal is referred to in section 9(2) and (4) of the Real Estate and Business Brokers Act with subsections read as follows:-

"(2). A notice under subsection 1 shall inform the applicant or registrant that he is entitled to a hearing by the Tribunal if he mails or delivers, within fifteen days after the notice under section 1 is served on him, notice in writing requiring a hearing to the Registrar and the Tribunal, and he may so require such a hearing.

. . .

(4). Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

The date for hearing after an adjournment was set for April 30th. 1973, in Sudbury. A supplementary notice dated March 29. 1973, containing further particulars was delivered by the registrar of Real Estate and Business Brokers. No notice requesting a hearing in respect of the supplementary notice was filed. Upon reviewing the supplementary notice Regis Moreau, David Wickett and Cambrian Realty Corporation Limited instructed their

solicitors to tender their real estate business brokers licences for revocation. The solicitor in accordance with instruction wrote to the Registrar on April 12th. 1973, in part, as follows:

" Pursuant to the instructions of our above noted clients we enclose herewith for revocation the Certificates of Registration for Cambrian Realty Corporation Ltd., David George Wickett and Regis C. Moreau effective at the close of business on Friday, April 13th, 1973. We also enclose Brokers Identification Certificates for Cambrian Realty Corporation Ltd. branch offices at Sudbury, Ontario; Sault Ste Marie, Ontario and Thunder Bay, Ontario along with a photostatic copy of the Identification Certificate for Cambrian Realty Corporation Ltd., Timmins, Ontario. We are further enclosing the Brokers Identification Certificate for Mr. Wickett. Mr Moreau advises that he is unable to locate his Brokers Identification Certificate but will forward the same as soon as it is located.

We are forwarding today a letter to the Registrar, Commercial Registration Appeal Tribunal, as instructed by our clients, withdrawing our request for hearing pursuant to Notice dated January 9th. 1973, a copy of this letter is enclosed herewith for your information."

By letter of same date the solicitors wrote to the Registrar Commercial Registration Appeal Tribunal as follows:-

" The Chairman of the Tribunal has instructed me to inform you that, notwithstanding your said letters, the hearing in the above matter will proceed at the time and place appointed, namely, at the Palladium Ballroom, Holiday Inn, Ring Road, Sudbury, Ontario at 11: o'clock in the forenoon, on April 30th. next."

On April 30th. 1973, a request for adjournment was made on the basis of the present outstanding motion before the Divisional Court and a request was repeated for withdrawal of the notice of hearing. The adjournment was granted and the request for the withdrawal of the notice of hearing was refused.

It is to be noted that the licences of Regis Moreau, David Wickett and Cambrian Realty Corporation Limited have now expired. In addition, these licences were tendered for revocation. Revocation is the maximum penalty proposed by the Registrar under that Act. It is submitted on behalf of the applicants that there is nothing with which the appeal tribunal can deal. On behalf of the respondent tribunal, it is suggested that by virtue of subsection (4) of section 9 the tribunal may make some additional order to the Registrar "to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations . . ."

It seems to me that where the maximum penalty has been proposed by the Registrar and where this penalty has been proposed by the Registrar and where this penalty has been agreed to by the broker, there is, in fact, nothing further with which the Tribunal can deal and the power of the Tribunal to direct the Registrar to take action referred to above would be limited to cases in which the maximum penalty of cancellation has not been imposed. In the circumstances it appears to me that the Tribunal in proceeding with the hearing is proposing to conduct an unwarranted and unnecessary enquiry for some purposes completely unconnected with the revocation of the licences of the applicants. This should not be permitted. The right to make an investigation under section 27a of the Real Estate and Business Brokers Act is not affected by the revocation of the licences. In the circumstances an order will go prohibiting the Commercial Registration Appeal Tribunal from proceeding further with the matter. There will be no costs of these proceedings.

* * * * *

RELEASED: June 19TH. 1973.

(af)

THE SUPREME COURT OF ONTARIO

B E T W E E N:

DAN KORNITZER REAL ESTATE LTD

Applicant/Appellant

- and -

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondents/
Respondents in Appeal

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under rule 61.12 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

Dated February 17, 1989.

A. P. Bridges,
Registrar

Court of Appeal/
Divisional Court

SUPREME COURT OF ONTARIO

DIVISIONAL COURT

BEFORE: Potts, Fitzpatrick and MacFarland, JJ.

DATE: October 3, 1988

DISPOSITION - THIS APPEAL/Albert Faccenda
vs Registrar of Real Estate and Business Brokers
and The Commercial Registration Appeal Tribunal

W. G. Sheppard for appellant.

Ms Rosalyn Train for respondent.

This is an appeal by Albert Faccenda, applicant/appellant, from the judgment of the Commercial Registration Appeal Tribunal decision, dated the 24th day of October 1987.

This appeal is dismissed.

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

B E T W E E N:

GOHEEN REALTY AND INSURANCE LIMITED
and ALLAN RAYMOND GOHEEN

Appellants
(PLAINTIFF)

- and -

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent
(DEFENDANT)

THIS IS TO CERTIFY that the appeal of the Appellants, (Plaintiffs) from the judgment pronounced in this cause on the 27th day of October 1982, not having been perfected as required by the rules, has been dismissed as an abandoned appeal. And it is now ordered that the said appellant shall pay to the respondent the costs of the said appeal to be taxed.

Dated this 15th day of December, 1983.

A. P. Bridges,
Registrar

Divisional Court

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTHOLLINGWORTH J.

IN THE MATTER OF the Judicial Review
Procedure Act:

AND IN THE MATTER OF the Real Estate
and Business Brokers Act, R.S.O. 1980
 Respondent Chapter 431;

AND IN THE MATTER OF the registration
 of Leo Joseph Hare as a real estate
 salesman:

AND IN THE MATTER OF the proposal of
 the Registrar of Real Estate and
 Business Brokers made pursuant to
 section 9(1) of the Real Estate
and Business Brokers Act to revoke
 the registration of Leo Joseph Hare.

B E T W E E N:

LEO JOSEPH HARE

Respondent
 (Appellant)

- and -

THE REGISTRAR OF REAL
 ESTATE AND BUSINESS BROKERS

Applicant
 (Respondent)

HOLLINGWORTH J.:

This is a notice of motion to quash the notice of appeal dated the 26th of March, 1984, of the Registrar of Real Estate and Business Brokers Act from the orders of the Commercial Registration Appeal Tribunal (the Tribunal) dated October 19, 1983, and March 14, 1984, and that these orders be set aside.

On the 23rd of November, 1982, the Registrar of Real Estate and Business Brokers suspended the licence of Leo Joseph Hare as a real estate salesman pursuant to s. 9(1) of the Act and the Tribunal, of course, rendered its decision in accordance with s. 9(4) of the Act, and in so doing reversed the Registrar thereby directing the Registrar not to carry out his proposal of revocation. The formal order was taken out on October 19, 1983, to this effect, the actual decision having been made on September 21, 1983. The actual reasons of the Board, which were very detailed and lengthy, were not delivered until March 14, 1984, and were served at the office of the solicitor for the respondent, in the hearing, on the 27th of March, 1984. Notice of the appeal was not served on Leo Joseph Hare at any time.

The point I must consider is a narrow one and is set out in the Notice of Motion as follows:

1. No Notice of Appeal has been served upon the said Leo Joseph Hare.
2. The time for Appealing expired on or before November 10, 1983 and not notice of appeal was served.

The Ministry of Consumer and Commercial Relations Act, R.S.O.

1980, c. 274, s.-s. 11(1) states as follows:

- 11.-(1) Any party to proceedings before the Tribunal may appeal its decision or order to the Divisional Court in accordance with the rules of court.

(my emphasis)

Rule 497b states:

...an appeal to an appellate court...shall be

made by notice of motion
served upon all
parties...within 15 days
after the date of the
judgment or order appealed
from.

Again, judgment was given on September 21, 1983, when the Tribunal directed the Registrar to revoke his order. On October 19, 1983, the formalization of the order took place when the Registrar mailed copies to the parties, but written reasons were not issued until March 14, 1984. Was the notice of appeal served within 15 days after the date of the judgment or order appealed from? If the earlier dates are taken, the notice of appeal was out of time, but on the other hand, if it is taken from the delivery of the judgment on the 14th of March, 1984, the notice for appeal is within the 15 days, that is to say, the 26th of March, 1984.

Mr. Rowan, in relying on the fact that service of a notice of appeal on the counsel for the parties on the proceedings below is not good service on the party and, hence, Leo Hare did not receive the notice of appeal, is based on the judgment of Otaco Limited v. The Town of Orillia, (1948) O.R. 37. Hogg, J.A., giving the principal judgment of the Court, at p. 43, states:

A notice of Appeal
delivered by the person
who is appealing to
the opposite party or
person appealed against
has been held to be an
essential element in
connection with an
intended appeal, and
an adversary or respondent
has a right to receive such
notice.

He then goes on to quote Jessel M.R. in Ex parte Saffery; In re Lambert (1877), 5 Ch. D. 365, at p. 367:

The meaning of appealing
is giving notice of your
adversary of your
intention to appeal by
serving upon him a notice
of appeal.

It was argued in that case that notice upon the solicitor, who had represented the appellant in the court below, is sufficient and it was held it was not. Mr. Rowan argued that this was exactly the case before the court.

Mr. Bader, for the Minister, relied on Rule 201 of the Rules of Practice, which reads:

201 (1) Documents that do not
require personal service
shall be served upon the
solicitor of the party to
be served.

He relied on the case of Harder v. Hayter, a decision of the Alberta Court of Appeal, found at (1975) 4 W.W.R. 765 at 768, and also on the quotation from Lady De La Pole v. Dick (1885), 29 Ch. D. 351:

Service on the solicitor
on the record of the party
is good service although
he has ceased to act.

In connection with the second point raised in the notice of motion, Mr. Rowan relies on Re Permanent Investment Corp. and Ops. & Graham Twp., (1967) 2 O.R. 13 at p. 24, where Schroeder J.A. states as follows:

...While under the rules the time
for appealing generally runs from
the date of pronouncement of the
judgment or order, where any sub-
stantial matter remains to be
determined on the settlement of a
judgment or order the time for
appealing will run from the date of
entry thereof: O'Sullivan v. Harty
(1885), 11 S.C.R. 322; County of
Elgin v. Robert (1905), 36 S.C.R.
27 at p. 32.

Mr. Rowan contends that no "substantial matter" remained, to be determined on the settlement of the judgment and, accordingly, the appeal time would run from the date the judgment was pronounced.

Mr. Bader relies on s. 17 of The Statutory Powers Procedure Act, R.S.O. 1980, c. 484, which reads as follows:

17. A tribunal shall give its
final decision and order,

if any, in and proceedings
in writing and shall give
reasons in writing
therefor if requested by
a party.

He says that this clearly contemplates that the decision is this case would not be rendered until the written reasons were delivered; the mailing requirements are taken care of by s. 18 which is not necessary to quote. He concedes that under the provisions of The Statutory Powers Procedure Act there is no provision as to how service should be effected and, consequently, that the Rules of Practice apply. Subsequently, Rule 201, supra, is applicable. He states that Otaco may well have been the law in 1948, but would not be applicable in 1984. He urged me to follow the Harder v. Hayter authority from the Alberta Court of Appeal indicating that it has great persuasive effect and that in reality it follows Rule 201 in Ontario. He wants me to rule that should I take the view that there should be personal service that I adjourn the matter and extend the time for service.

It seems to me that this is almost a penal statute in that a man's right to make a living is revoked if he is suspended. There is no reason to believe that Otaco is still not good law in Ontario and in this case the documents were not served on Hare personally. I do not feel that under the circumstances of this particular statute that service on a solicitor is adequate. And Rule 497b specifies that "it must be served upon all parties". This, therefore, ends the matter, but were I to rule on the other matter on the second ground of the notice of appeal, I would also accept the appellant's argument.

Therefore, the notice of motion is granted and the appeal is quashed with costs. The appellant here is to have costs of this motion.

Released: June 12, 1984

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

THE HONOURABLE MR. JUSTICE) THURSDAY, THE 19TH
CAMPBELL)
) OF NOVEMBER, 1987.

IN THE MATTER OF The Real Estate and Business Brokers
Act, R.S.O. 1960, Chapter 431 and amendments and
regulations thereto;

AND IN THE MATTER OF the Ministry of Consumer and
Commercial Relations Act, R.S.O. 1980, c.274.

B E T W E E N:

THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Appellant

- and -

WILHELM HAURENHERM

Respondent

ORDER ON APPEAL

THIS APPEAL by The Registrar of Real Estate and Business
Brokers from the decision and Order of the Commercial Registration
Appeal Tribunal, released February 21, 1986, was considered this
day at 130 Queen Street West, Toronto.

ON READING the Minutes of Settlement, filed, no one
appearing for the Appellant and no one appearing for the
Respondent,

1. THIS COURT ORDERS that the decision and Order of the
Commercial Registration Appeal Tribunal released February 21, 1986
be set aside.

2. THIS COURT ORDERS that Wilhelm Haurenherm's registration as a real estate salesman under the Real Estate and Business Brokers Act will be suspended for a period of twelve months commencing November 23, 1987.

3. THIS COURT ORDERS that there shall be no order as to costs.

Registrar, Divisional Court

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

IN THE MATTER OF The Real Estate and Business Brokers Act, R.S.O. 1960, Chapter 431 and amendments and regulations thereto;

AND IN THE MATTER OF the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980, c.274.

B E T W E E N:

THE REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Appellant

- and -

WILHELM HAURENHERM

Respondent

MINUTES OF SETTLEMENT

THE UNDERSIGNED PARTIES agree to resolve this matter as follows:

1. Wilhelm Haurenherm's registration as a Real Estate Salesman under the Real Estate and Business Brokers Act will be suspended for a period of twelve months commencing from November 23, 1987.
2. This twelve-month suspension is as a result of Wilhelm Haurenherm having:
 - (a) acted as an unregistered Real Estate Broker, contrary to s.3(1)(a) and s.27 of the Real Estate and Business Brokers Act (the Act);
 - (b) acted on behalf of a corporation in connection with a trade in real estate when he and the corporation were not registered as brokers, contrary to s.3(a)(c) of the Act;

- (c) accepted commission or other remuneration for trading in real estate from a person other than the broker with whom he was registered, contrary to s.30 of the Act;
- (d) failed to maintain proper business records and trust accounts in violation of s.19 of the Act;
- (e) acted as an unregistered real estate broker, Haurenherm employed the salesmen of another broker, contrary to s.29(a) of the Act, and he paid commission or remuneration to such a salesman contrary to s.29(c) of the Act;

3. The undersigned consent to and the parties agree to be bound by the foregoing terms of settlement.

DATED at Toronto this 5th day of November, 1987.

Witness

Rosalyn Train, Counsel
Attorney General for Ontario
Ministry of the Attorney General
Solicitors for the Appellant

Witness

Steve D'Agostino, Esq.
Messrs. Thomson, Rogers
Solicitors for the Respondent

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTLIEFF, STARK and PENNELL, JJ.

IN THE MATTER OF THE REAL ESTATE)	
AND BUSINESS BROKERS ACT, R.S.O.	)	<u>R. Lundy</u> , for the
1970, C. 401 AS AMENDED:	)	Appellant.
)	
AND IN THE MATTER OF MICHAEL	)	No one appearing
LENCHYSHYN AND AN APPEAL FROM	)	for the Applicant
AN ORDER OF THE COMMERCIAL	)	Respondent.
REGISTRATION APPEAL TRIBUNAL.)	
)	
B E T W E E N:)	
)	
MICHAEL LENCHYSHYN,)	
)	
Applicant,)	
)	
-and-)	
)	
REGISTRAR OF REAL ESTATE AND)	
BUSINESS BROKERS,)	
)	
Respondent)	
(Appellant)	)	<u>Heard:</u> May 22nd, 1974.

LIEFF, J: (ORALLY).

We are all of the opinion that the Commercial Registration Appeal Tribunal had an opportunity during the seven days the applicant was before them to watch him, to listen to him, to make up their minds about the man's integrity or otherwise. They in fact found that he had contravened the law in five ways set out in the material, and that counsel was good enough to repeat for my brother Pennell. We have been told that this is a very well behaved calling, inasmuch as the tribunal has not had to discipline very many registered brokers. To that extent there is no rash of offences that have to be stopped by making an example of this man so that it would act as a deterrent to others. We are, of course, interested in doing what is necessary to protect the public interest. However, we all feel that the tribunal was in a better position than we are, composed as it is of a chairman who is an experienced lawyer and at least one more member of the tribunal who was drawn from the real estate profession itself. We feel they were in as good, if not a better, position that we were

to know what is necessary in this situation. It was rather interesting to us that although the decision of the Commercial Registration Appeal Tribunal is dated December 8th, 1972, it is only now that the matter comes before us. In effect, eighteen months of the two years' suspension have already gone by. To some extent there is a semblance of possible prejudice to the applicant in this delay. Considering the nature of the offences which were found by the tribunal, and considering the fact that the man has been suspended for two years and has had to look elsewhere for a living, we feel that in all the circumstances the penalty imposed on Michael Lenchyshyn is quite adequate and we will not disturb it.

PENNELL, J: (ORALLY).

I just want to say to counsel who represented the appellant, in my respectful opinion and I speak only for myself, that Michael Lenchyshyn was dealt with very leniently. However, the fact that he had nearly fourteen years registered as broker without, so far as I am aware, being cautioned for his conduct in dealings with the public is to his credit. I think there is a personal relationship of trust and confidence on the one side and superior knowledge on the other side on the part of the salesman, and the protection of the public is the main consideration. However, for the reasons given by my learned brother Lieff, the chairman, I agree that the penalty should stand undisturbed.

STARK, J: (ORALLY).

I agree with the views expressed by the chairman and have nothing further to add.

Released: May 28, 1974

IN THE SUPREME COURT OF ONTARIOTORONTO WEEKLY COURT

B E T W E E N:

RE/MAX ONTARIO-ATLANTIC
CANADA INC.

Applicant

) Bryan Finlay, Q.C.
) for the applicant
)

- and -

THE REGISTRAR OR REAL
ESTATE AND BUSINESS
BROKERS and THE ATTORNEY
GENERAL OF ONTARIO

Respondents

) D. Thomas H. Bell
) for the respondents
)) Heard: Oct. 8, 1986
) Nov. 14, 1986
)
)
)

REID J.:

The narrow but important issue here is set out concisely in applicant's record as follows:

"1. The applicant makes application for:

- (i) a declaration that the Applicant is allowed by the terms of the Real Estate and Business Brokers Act R.S.O. 1980 c. 431, as amended (the "Act") to establish the relationship of "independant contractor" as between his licensee and salesman.

2. The grounds for the application are:

- (a) that the provisions of the Act do not preclude the establishment of the intended relationship of "independant contractor";
- (b) Rule 14.05(3)(d) and (h)."

The background to the application is set out in the affidavit of Walker Schneider filed in support of the application, now set out (with formalities omitted).

"1. I am the President of the applicant and as such have knowledge of the matters herein deposed.

2. Re/Max Ontario-Atlantic Canada Inc. ("Re/Max") is the regional director of the Re/Max real estate brokerage system in Ontario. As such it franchises registered real estate brokers to operate under the Re/Max name in Ontario. Those brokers in turn engage the services of salesmen, solicit listings and act as agents on the sale, purchase and leasing of real estate. Re/Max currently franchises approximately 110 brokers in Ontario and those brokers in turn employ in the aggregate approximately 2,200 salesmen.

3. It is the intention of the applicant to permit its brokers to engage salesmen in circumstances which would constitute an "independent contractor" relationship.

4. I have had discussions with the Registrar of Real Estate and Business Brokers ("Registrar") to obtain his approval to the establishment of the relationship of "independent contractor". The Registrar has advised me that there is no jurisdiction under the Real Estate and Business Brokers Act, R.S.O. 1980, c.431, as amended (the "Act") to allow this legal relationship.

5. It is my position that the Act does in fact allow for the broker to engage the salesman as an "independent contractor".

6. The Registrar has further advised me that if the applicant permits the broker to engage the salesman as an "independent contractor", he will consider cancelling or causing to be cancelled the registration of the broker granted under the Act which permits the latter to carry on business as a real estate and business broker in the Province of Ontario."

Mr. Finlay's submission points out that:

The Real Estate and Business Brokers Act, R.S.O. 1980, c. 431, as amended, (the "Act") requires that traders in real estate be registered as "brokers" or "salesmen". Salesman is defined to mean "a person employed, appointed or authorized by a broker to trade in real estate" (emphasis added). A salesman must trade only on behalf of a broker, who according to the records of the Registrar, is his "employer". There is no definition of "employer" or "employee" in the Act" and refers to sections 1(m), 3(1)(a), (b) and 30 of the Act.

In support of his submission that the Act does not preclude a broker engaging a salesman as an independant contractor

he makes the following argument, (a lightly edited version of his factum). The emphasis, where added, is his:

"Pursuant to section 30 of the Act:

No salesman shall trade in real estate on behalf of any broker other than the broker who, according to the records of the Registrar, is his employer, and no salesman is entitled to or shall accept any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer.

Pursuant to section 1(m) of the Act,

'salesman' mean a person employed, appointed or authorized by a broker to trade in real estate;

In addition to section 1(m) of the Act, there are several other references to relationships other than employment arrangements throughout the Act. The Act requires every broker to notify the Registrar in writing of "any commencement or termination of employment, appointment or authorization of a salesman". Every salesman must also comply with the same notification requirements. A broker is prevented from employing or engaging the salesman of another broker.

(i) Section 21(1)(c), 21(2)(c) and 29(a) of the Act

It is submitted that the Act clearly contemplates arrangements other than "employer/employee" by the use of the words "appointed or authorized" in section 1(m), 21(1)(c) and 21(2)(c) of the Act. Other provisions of the Act such as section 29(a) ("employing or engaging".) are similarly drafted in broad terms.

Although section 30 of the Act uses the word "employer", this term should be construed in accordance with the words preceding it, i.e., "according to the records of the Registrar". The records of the Registrar exist by virtue of section 21, which uses the same broad wording as is contained in the definition of "salesman". Sections 13 and 14 of the Regulation 891, R.R.O. 1980, as amended, under the Act, do not stipulate "employment" as a pre-condition to registration. In addition, section 3(1) of the Act prevents a person from trading in real estate unless

registered as a salesman or broker but does not require "employment" as a pre-condition to such trading.

Although there are numerous references to employers and employees in the forms prescribed by the Regulations under the Act to be filed with the Minister, these forms are used in connection with three other separate statutes: The Consumer Reporting Act, Collections Agencies Act and the Motor Vehicle Dealers Act. Therefore, it can be expected that the forms would be drafted on a general basis. It would seem appropriate to treat any references to "employers" and "employees" as general terms that should be read in the context of the act to which they relate.

- (i) Sections 1(2)(3)(5), 13 (10)(11)(15) and 15 of Regulation 891 (Amendment Regulation 618/83).

In any event, it is submitted that a salesman may be employed by an employer without being an "employee". There is nothing in the Act which suggests that the word "employed" as used in the definition of "salesman" in s.1(m) is to be narrowly construed, and there are numerous cases which indicate that an independent contractor is "employed" by his "employer".

- (i) Higginson v. Kelowna Pines of Golf Course Ltd. et al (1981), 121 D.L.R. (3d) 449 (B.C.S.C.);
- (ii) Carter v. Bell and Sons, (1936) O.R. 290 (C.A.);
- (iii) Greenberg v. Meffert (1985) 50 O.R. (2d) 755 (C.A.);
- (iv) Paper Sales Corporation Ltd. v. Miller Bros. Co. (1962) Ltd. (1975), 7 O.R. (2d) 460 (C.A.);
- (v) Cormier v. Alberta Human Rights Commissions and Ed Block Frenching Ltd. (1984), 33 Alta. L.R. (2d) 359 (Q.B.)."

Respondents position is stated succinctly in Mr Bell's factum as follows:

"It is submitted that the court does not have jurisdiction under Rules 14.05(3)(d) & (h) of the Rules of Civil Procedure to consider this application as the actual facts are not known and the court is being asked to make a determination a proposed contractual arrangement which has not been finalized.

Alternatively, if the court does have jurisdiction to entertain this application at this time, it is submitted that the status of "independent contractor" is inconsistent with the scheme of supervision, responsibility and administration as between a real estate broker and the salesmen employed by him as set out in the Act."

His argument in support of this position is set out in his factum as follows (again, lightly edited).

"It is submitted that it is only upon the facts as they actually exist that the court has jurisdiction to grant a declaration regarding the rights of the parties under Rules 14.05(3)(d) & (h). The present application is in respect of a future contemplated contractual relationship of presently uncertain content and form and as such is not a proper matter for the court to consider.

Re 296616 Ontario Ltd. v. Town of Richmond Hill (1977)
14 O.R. (2d) 787 (Ont. C.A.)

Re Inter-City Truck Lines (Canada) Inc. et al v. The Attorney General for the United States (1982) 133 D.L.R. (3d) (Ont. H.C.J.)

Re Dambrosi (1957) O.W.N. 364 (Ont. H.C.J.)

Re Skinner (1970) 3 O.R. 35 (Ont. H.C.J.)

An application under Rule 14.05(3) should only be used where there is no matter in dispute between the parties and when the document to be construed is the only document to which it is necessary to give attention. This extraordinary procedure should not be used if the interpretation of construction of the document will not end the litigation and finally determine the rights of the parties.

Anglo Can. Fire & Gen. Ins. Co. v. Robert E. Cook Ltd.
(1973) 2 O.R. 385 (Ont. H.C.J.)

Re City of Burlington v. Clairton Village (1979) 24 O.R. (2d) 586 (Ont. C.A.)

To distinguish between an independent contractor and a servant the test is whether or not the employer retains the power, not only of directing what work is to be done but also of controlling the manner of doing the work. If a person can be overlooked and directed in regard to the manner of doing his work, such person is not a contractor.

Dallantonio v. McCormick (1913) 29 O.L.R. 319 at 330 (Ont. C.A.)

The manner in which an independent contractor carries out his employment is inconsistent with the scheme of supervision, responsibility and administration as between a registered real estate broker and a salesman employed by him as set out in the Act.

Act ss. 3(1)(b), 4(2), 7(1)(c), 19(1), 19(2), 20, 21(1)(c), 21(4), 28, 29(a), 30, 33, 35(1), 47

Regulation 891 passed under the Act, ss. 2(1), 13(7), and 13(13)"

These submissions were relied on but somewhat embellished in oral argument.

In Volume 2 of applicant's record Mr. Finlay has set out the form of current agreement between applicant's franchised brokers and the proposed agreement that would constitute salesmen as independent contractors. I accept that applicant does not seek by such an agreement to contravene the Act. Rather, the agreement is drawn so as to conform with the Act, as applicant reads it.

Thus, the difficulty between the parties lies in their interpretations of the Act. The Registrar's view is that the relationship between broker and salespersons (called salesmen in the Act) must be that of master (or mistress) and servant.

On the subject of jurisdiction, I view the Registrar's stance as clearly threatening. Applicant is on notice that if its franchisees enter into the proposed agreement, or indeed, any agreement that constitutes salespersons as independent contractors it, and they, will be viewed as contravening the Act. It would be the Registrar's duty to proceed under s.49 or s.50 of the Act, the cogent parts of which state:

49.-(1) Where it appears to the Director that any person does not comply with any provision of this Act, the regulations or an order made under this Act, notwithstanding the imposition of any penalty in respect of such non-compliance and in addition to any other rights he may have, the Director may apply to a judge of the High Court for an order directing such person to comply with such provision, and upon

the application the judge may make such order or such other order as the judge thinks fit.

. . .

50.-(1) Every person who, knowingly,

. . .

(b) fails to comply with any order, direction or other requirement made under this Act; or

(c) contravenes any provision of this Act or the regulations,

and every director or officer of a corporation who knowingly concurs in such furnishing, failure or contravention is guilty of an offence and on conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both.

50.-(2) Where a corporation is convicted of an offence under subsection (1), the maximum penalty that may be imposed upon the corporation is \$25,000 and not as provided therein.

The consequences could be serious for applicant. I think it is entitled to apply for a declaration under R.14.05.(3)(d). I see no reason why applicants should have to expose themselves to the risk of such consequences as ss.49 and 50 might bring when the Act is so clearly ambiguous and where their intention is not to attempt to avoid it but to arrange their business affairs so as to comply with it.

As to the interpretation of the Act, it must be made in light of the strong tradition of free enterprise in this province and the strong support the courts have always given to the right of an individual to earn a living. The Act contains no direct preclusion against salesmen being engaged as independent contractors. Indeed, s.29 and others relied on by Mr. Finlay seem to contemplate it. Other sections to which Mr. Bell has drawn attention, when read alone, do not carry that suggestion.

The status of independent contractor is known in most, if not all, facets of commercial activity. So far as I am aware sales persons in all, or nearly all fields of commercial life, are not precluded from engaging, or being engaged, as independent

contractors. I see no reason why the Act must be read so as to force that preclusion. The Registrar seems to think that the Act must be read as he suggests in order that he may effectively supervise real-estate sales persons. In other words, he seeks an interpretation that suits his purposes. I can understand that objective, but I cannot accept it as a criterion for interpreting the statute.

In my opinion, the Act does not support the Registrar's view. I do not read this statute as precluding sales persons from being engaged by real estate brokers as independent contractors.

The declaration sought is granted.

Costs

The point at issue is a novel one. The Registrar's obduracy in refusing to consider even the possibility that an agreement might be drawn so as to constitute salespersons independent contractors coupled with his threat really forced this application into being. An order for costs in applicant's favour is appropriate.

I should add that I was very ably assisted by both counsel.

THE SUPREME COURT OF ONTARIO

B E T W E E N:

TIKKA DATINDER SINGH SODHI

Appellant

- and -

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

ORDER DISMISSING APPEAL

The appellant has not perfected this appeal, and has not cured the default, although given notice under rule 61.12 to do so.

IT IS ORDERED that this appeal be dismissed for delay, with costs.

Dated: December 7, 1987.

A. P. Bridges,
Registrar

Divisional Court

IN THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT
OSLER, EBERLE AND SIROIS, JJ.

IN THE MATTER OF certain)
proceedings pending before The)
Commercial Registration Appeal)
Tribunal;)

AND IN THE MATTER of the Travel)
Industry Act, R.S.O. 1980, c.509;)

AND IN THE MATTER of a ruling)
of the Commercial Registration)
Appeal Tribunal made on the 28th)
& 29th days of July, 1982;)

AND IN THE MATTER OF the)
provisions of the Judicial Review)
Procedure Act, R.S.O. 1980, c.224;)

B E T W E E N:)

ALAMEDA COUNTY DENTAL SOCIETY,)
ET AL.)

Applicants)	M. D. Lipton, Q.C. and
(Respondents in the)	<u>H. D. Greenberg</u>
Judicial Review)	for the applicant
proceedings))	
	<u>S. R. Rickett</u>
	for individual respondents

- and -)

THE BOARD OF TRUSTEES APPOINTED)
UNDER SECTION 5 OF THE SCHEDULE)
TO SAID ONTARIO REGULATION 938/80)

Respondent,)
(Applicant in the)
Judicial Review)
proceedings))

T. C. Marshall, Q.C.
for the Commercial
Registration Appeal
Tribunal.

Heard: November 9, 1983.

OSLER, J. (Orally):-

We have been concerned with three applications closely related brought under the provisions of the Travel Industry Act. Under circumstances that go back to 1977, four groups of American citizens each of whom belonged to one of four associations were disappointed in their travel arrangements and, as a consequence, brought claims against the trustees of the fund established under the Act. The claims were disallowed by the board of Trustees and in consequence, these persons proceeded under the provisions of s.16 of the Schedule 2, Regulation 938 under the Act and required a hearing from the Appeals Tribunal. Notice of the hearing was served and no complaint is made about the adequacy of the notice. The hearing proceeded for several days and all claimants were represented by the same counsel.

With respect to the members of one association, no claimant appeared and the Board dealt with the appeals of that group by dismissing them. With respect to the others, counsel advised that no member of one of the groups intended to give evidence although ultimately, the wife of one of the claimants did so. With respect to that and other groups what was referred to as background evidence was called in the form of the executive secretary or comparable official from each group testifying as to the manner in which the travel arrangements were made.

After several days of hearing the Board made a ruling, the concluding sentence of which read as follows:

The Tribunal is of the opinion that it would be a useful procedure to complete the hearings related to the claims that have been heard [as set out in Appendix B(i) and to adjourn all the other hearings (as set out in Appendix B(ii)) sine die to a date to be set by the Registrar upon 10 days notice.

The applicant here which is the Board of Trustees from whose decision these appeals were taken, claims injustice in these rulings and that the Board had no right of its own motion to adjourn sine die or to call upon the respondent Tribunal to lead evidence or otherwise advance its case before the evidence respecting all the claimants had been heard.

In our view, whatever one may think of the wisdom or otherwise of the Board's rulings nothing is here going to jurisdiction. Section 21 of the Statutory Powers Procedure Act provides in clear terms that a hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the

satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. We see nothing in the decision of the Tribunal in breach of that section nor do we find anything reviewable in the decision to conclude the case with respect to the claimants whose evidence had been heard without waiting until all claimants were heard. These were individual cases and the Board had the right to treat them as such. It is the master of its own procedure. For these reasons, we are all of the view that each of these applications must be dismissed.

Released: November 23, 1983.

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

IN THE MATTER OF The Ministry of Consumer and
Commercial Relations Act, R.S.O., 1980,
Chapter 274;

AND IN THE MATTER OF The Travel Industry Act,
R.S.O. 1980, Chapter 509;

AND IN THE MATTER OF Lawson McKay Tours
Limited;

AND IN THE MATTER OF a Decision of the Board
of Trustees made pursuant to Section 16 of the
Schedule of Regulation 938, R.R.O., 1980 to
the said Travel Industry Act;

AND IN THE MATTER OF an Appeal from a Decision
and Order of the Commercial Registration Appeal
Tribunal dated March 1, 1982;

B E T W E E N:

THE BOARD OF TRUSTEES APPOINTED UNDER SECTION
5 OF THE SCHEDULE TO REGULATION 938, R.R.O.,
1980 THE TRAVEL INDUSTRY ACT, R.S.O., 1980,
C.509

Appellant

- and -

DOROTHY ARMSTRONG, THE REV. & T. M. BAILEY,
KATHLEEN BAILEY, EDITH CLARK, DR. & MRS. GEORGE
CLARKE, J. D. CLEGHORN, MARGARET COLLETT, REV.
& MRS. JOHN CRUICKSHANK, REV. & MRS. GORDON
CUNNINGHAM, LUCY DICK, ELSIE DROVER, M.
GERTRUDE GRANT, HELEN I. GREEN, ELLA G. HARRIS,
MOLLIE HEDRICK, FLORENCE JAMES, MAXINE DRICK,
W. M. MARSHALL, MARJORIE MCCLEMENS, MARION
MCEWEN, EDNA MORRELL, EVELYN MORRIS, HELEN L.
MUDDIMAN, HAZEL I. MURRAY, DOROTHY NEAL, JEAN
NEWTON, EVELYN PATON, ANNE C. PECKOVER, MR. &
MRS. DONALD PEPPER, MARY RODGERS, EDNA M.
ROSEWELL, CATHERINE SACHS, SHARON SMITH, AUDREY
SPENCER, EDITH STEPHENSON, MARION J. THOMPSON,
MR. & MRS. CHARLES A. TOLL, E. C. TRELEAVEN,
CATHERINE WATSON AND STELLA WILLOX

Respondents
(Claimants)

ORDER

UPON motion made this day on behalf of the Appellant by way of appeal from the Decision and Order of the Commercial Registration Appeal Tribunal dated March 1, 1982 in the presence of counsel for all parties and upon hearing read the pleadings and proceedings herein and upon hearing counsel for the Appellant:

1 IT IS ORDERED that the appeal be and the same is hereby dismissed.

2. IT IS FURTHER ORDERED that the Respondents herein be and the same are hereby entitled to interest on the amounts of their claims at the rate of 12% per annum from the date of the Decision of the Board of Trustees being May 8, 1981 to the date of payment.

3. IT IS FURTHER ORDERED that the Appellant do pay the costs of this application to the Respondents forthwith after taxation thereof.

Registrar, Court of Appeal

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTOSLER, EBERLE AND SIROIS JJ.

IN THE MATTER OF certain)
 proceedings pending before the)
 Commercial Registration Appeal)
 Tribunal;)

AND IN THE MATTER of the)
Travel Industry Act, R.S.O.1980)
 C.509;)

AND IN THE MATTER of a)
 ruling of the Commercial)
 Registration Appeal Tribunal)
 made on the 28th & 29th days)
 of July, 1982;)

AND IN THE MATTER of the)
 provisions of the Judicial Review)
Procedure Act, R.S.O. 1980,)
 c.224.)

B E T W E E N:)

ASSOCIATED BUILDING INDUSTRY)
 OF NORTHERN CALIFORNIA, WEST BAY/)
 NORTHERN DIVISION, ET AL)

Applicants,)
 (Respondents in the)
 Judicial Review)
 proceedings))

- and -)

THE BOARD OF TRUSTEES)
 APPOINTED UNDER)
 SECTION 5 OF THE SCHEDULE)
 TO SAID ONTARIO)
 REGULATION 938/80)

Respondent,)
 (Applicant in the)
 Judicial Review)
 proceedings))

M.D. Lipton Q.C. and)
H.D. Greenberg)
 for the applicant)

S.R. Rickett)
 for individual respondents)
T.C. Marshall, Q.C.)
 for the Commercial)
 Registration Appeal)
 Tribunal)

Heard: November 9, 1983)

OSLER J. (Orally):-

We have been concerned with three applications closely related brought under the provisions of the Travel Industry Act. Under circumstances that go back to 1977, four groups of American citizens each of whom belonged to one of four associations were disappointed in their travel arrangements and, as a consequence brought claims against the trustees of the fund established under the Act. The claims were disallowed by the Board of the Trustees and in consequence, these persons proceeded under the provisions of s.16 of the Schedule 2, Regulation 938 under the Act and required a hearing from the Appeal Tribunal. Notice of hearing was served and no complaint is made about the adequacy of the notice. The hearing proceeded for several days and all claimants were represented by the same counsel.

With respect to the members of one association, no claimant appeared and the Board dealt with the appeals of that group by dismissing them. With respect to the others, counsel advised that no member of one of the groups intended to give evidence although ultimately, the wife of one of the claimants did so. With respect to that and other groups what was referred to as background evidence was called in the form of the executive secretary or comparable official from each group testifying as to the manner in which the travel arrangements were made.

After several days of hearing the Board made a ruling, the concluding sentence of which read as follows:

The Tribunal is of the opinion that it would be a useful procedure to complete the hearings related to the claims that have been heard [as set out in Appendix B (i) and to adjourn all the other hearings (as set out in Appendix B (ii)] sine die to a date to be set by the Registrar on 10 days notice.

The applicant here which is the Board of Trustees from whose decision these appeals were taken, claims injustice in these rulings and that the Board had no right of its own motion to adjourn sine die or to call upon the respondent Tribunal to lead evidence or otherwise advance its case before the evidence respecting all the claimants had been heard.

In our view, whatever one may think of the wisdom or otherwise of the Board's rulings nothing is here going to jurisdiction. Section 21 of the Statutory Powers Procedure Act

provides in clear terms that a hearing may be adjourned from time to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. We see nothing in the decision of the Tribunal in breach of that section nor do we find anything reviewable in the decision to conclude the case with respect to the claimants whose evidence had been heard without waiting until all claimants were heard. These were individual cases and the Board had the right to treat them as such. It is the master of its own procedure. For those reasons, we are all of the view that each of these applications must be dismissed.

RELEASED: November 23, 1983

No. 157/85

SUPREME COURT OF ONTARIO

(DIVISIONAL COURT)

THE HONOURABLE MR. JUSTICE REID)	
	)	WEDNESDAY, THE 11th
THE HONOURABLE MR. JUSTICE KREVER)	
	)	DAY OF SEPTEMBER, 1985
THE HONOURABLE MR. JUSTICE POTTS)	

IN THE MATTER OF THE TRAVEL Industry Act, R.S.O. 1980, c. 509, as amended;

AND IN THE MATTER of a ruling by the Commercial Registration Appeal Tribunal made on the 15th day of January, 1985;

AND IN THE MATTER of the provisions of The Judicial Review Procedure Act, R.S.O. 1980, c. 224, as amended;

AND IN THE MATTER of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1980 C.274;

B E T W E E N ;

THE BOARD OF TRUSTEE appointed under Section 5 of the Schedule to Ontario Regulation 938/80 as amended made under The Travel Industry Act.

Applicant

- and -

Gordon Hanson, Yvonne Hanson, Oscar Auerbach, Ruth Auerbach, Dan Peterson and Joan Peterson, claimants under the Compensation Fund, under Section 15 of the Schedule to Ontario Regulation 938/90 as amended made under the Travel Industry Act, as aforesaid.

Respondents

- and -

The Commercial Registration Appeal Tribunal constituted pursuant to the said Ministry of Consumer and Commercial Relations Act.

Respondent

O R D E R

THIS MOTION MADE by the Board of Trustee, appointed under Section 5 of the Schedule of Ontario Regulation 938/80 as amended made under for an Order:

- (a) quashing the Order of the Commercial Registration Appeal Tribunal ("Tribunal") permitting the evidence of the Respondents (claimants) to be tendered solely by Affidavit and prohibiting the Applicant the right to cross-examine the said Respondents; and
- (b) requiring the Respondents (claimants) to give oral evidence in support of their claims before the Tribunal and permitting the Applicant to cross-examine the said Respondents thereon;

was heard this day at Osgoode Hall, 130 Queen Street West, Toronto.

ON READING the Record filed by the Applicant, the Record filed by the individual Respondents, the transcript of the proceedings before the tribunal, the factums of law filed by the Applicant and the individual Respondents, the briefs of authorities filed by the Applicant and the individual Respondents, and on hearing the submissions of Counsel for the Applicant, the individual Respondents and the Commercial Registration Appeal Tribunal;

1. THE COURT ORDERS that the within application for judicial review be dismissed with costs to the individual Respondents.
-

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

OSLER, EBERLE AND SIROIS JJ.

IN THE MATTER OF CERTAIN)
proceedings pending before the)
Commercial Registration Appeal)
Tribunal;)

AND IN THE MATTER of the)
Travel Industry Act, R.S.O.1980)
C.509;)

AND IN THE MATTER of a)
ruling of the Commercial)
Registration Appeal Tribunal)
made on the 28th & 29th days)
of July, 1982;)

AND IN THE MATTER of the)
provisions of the Judicial Review)
Procedure Act, R.S.O. 1980,)
c.224.)

B E T W E E N:)

MEDICAL SOCIETY OF SANTA)
BARBARA COUNTY, ET AL.)

Applicants,)
(Respondents in the)
Judicial Review)
proceedings))

M.D. Lipton Q.C. and)
H.D. Greenberg)
for the applicant)

- and -)

THE BOARD OF TRUSTEES)
APPOINTED UNDER)
SECTION 5 OF THE SCHEDULE)
TO SAID ONTARIO)
REGULATION 938/80)

S.R. Rickett)
for individual respondents)
T.C. Marshall, Q.C.)
for the Commercial)
Registration Appeal)
Tribunal)

Respondent,)
(Applicant in the)
Judicial Review)
proceedings))

Heard: November 9, 1983

OSLER J. (Orally):-

We have been concerned with three applications closely related brought under the provisions of the Travel Industry Act. Under circumstances that go back to 1977, four groups of American citizens each of whom belonged to one of four associations were disappointed in their travel arrangements and, as a consequence brought claims against the trustees of the fund established under the Act. The claims were disallowed by the Board of the Trustees and in consequence, these persons proceeded under the provisions of s.16 of the Schedule 2, Regulation 938 under the Act and required a hearing from the Appeal Tribunal. Notice of hearing was served and no complaint is made about the adequacy of the notice. The hearing proceeded for several days and all claimants were represented by same counsel.

With respect to the members of one association, no claimant appeared and the Board dealt with the appeals of that group by dismissing them. With respect to the others, counsel advised that no member of one of the groups intended to give evidence although ultimately, the wife of one of the claimants did so. With respect to that and other groups what was referred to as background evidence was called in the form of the executive secretary or comparable official from each group testifying as to the manner in which the travel arrangements were made.

After several days of hearing the Board made a ruling, the concluding sentence of which read as follows:

The Tribunal is of the opinion that it would be a useful procedure to complete the hearings related to the claims that have been heard (as set out in Appendix B (i) and to adjourn all the other hearings (as set out in Appendix B (ii)) sine die to a date to be set by the Registrar on 10 days notice.

The applicant here which is the Board of Trustees from whose decision these appeals were taken, claims injustice in these rulings and that the Board had no right of its own motion to adjourn sine die or to call upon the respondent Tribunal to lead evidence or otherwise advance its case before the evidence respecting all the claimants had been heard.

In our view, whatever one may think of the wisdom or otherwise of the Board's rulings nothing is here going to jurisdiction. Section 21 of the Statutory Powers Procedure Act provides in clear terms that a hearing may be adjourned from time

to time by a tribunal of its own motion or where it is shown to the satisfaction of the tribunal that the adjournment is required to permit an adequate hearing to be held. We see nothing in the decision of the Tribunal in breach of that section nor do we find anything reviewable in the decision to conclude the case with respect to the claimants whose evidence had been heard without waiting until all claimants were heard. These were individual cases and the Board had the right to treat them as such. It is the master of its own procedure. For those reasons, we are all of the view that each of these applications must be dismissed.

RELEASED; November 23, 1983

IN THE SUPREME COURT OF ONTARIODIVISIONAL COURTSIROIS J.

IN THE MATTER OF AN ACTION IN THE)
 PROVINCIAL COURT (CIVIL DIVISION))
 OF THE MUNICIPALITY OF)
 METROPOLITAN TORONTO, IN THE)
 NORTH YORK SMALL CLAIMS COURT)

B E T W E E N :)

MRS. WILLIAM PELL)

Plaintiff/Appellant)

- and -)

DR. EARL FARBER)

Defendant/Respondent)

B.L. Georgieff
 for the Plaintiff/
 Appellant

R. Paul Steep
 for the Defendant/
 Respondent

Heard: January 18, 1985

SIROIS J. (Orally):

This is an appeal on behalf of the plaintiff/appellant, Mrs. William Pell from a decision of Judge Caswell in the Provincial Court (Civil Division) in the Municipality of Metropolitan Toronto in the North York Small Claims Court.

The first ground of appeal, not in number but I think in importance, deals with the fact that midway through the trial the learned trial judge refused the apparent request of the plaintiff for an adjournment in order that she may retain the services of a lawyer. Having read the transcript of what took place, I find that the learned trial judge was justified in ordering the trial to continue to its conclusion. There is also in the Notice of Appeal a claim that the learned trial judge was wrong in finding that there was informed consent on the part of the plaintiff whose consent was filed as an exhibit to the action. There is also a claim for negligence as a result of malpractice. The trial judge held that there was no negligence in this case. To do otherwise at this level would mean that I would set aside the decision of the trial judge who is the sole person entitled to make findings on the evidence choosing between the evidence of one witness as opposed to the other.

In this case she did find that there was no evidence of malpractice based on the fact of her own observation of the doctor whom she concluded was competent and she also concluded that there was no evidence to prove that there had been any ill effects suffered by the plaintiff from the two medical reports filed on her behalf.

I see therefore no reason to interfere with the learned trial judge's decision and this appeal will be dismissed without costs.

RELEASED: -----

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURTDISMISSAL UNDER RULE 61.12

NAME	DATE	ACT
CARLETON CONDOMINIUM CORP. NO. 111	July 8, 1985	ONHW
FAWCETT, K. M.	December 29, 1986	REBB
566595 ONTARIO LTD (CHEATERS TAVERN)	March 20, 1987	LLA
MALHAM, N.	March 30, 1987	REBB

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

DISMISSAL UNDER RULE 502

NAME	DATE	ACT
COGAN, P. (PARKVIEW HOTEL)	September 3, 1982	LLA
HOEHNDER RESTAURANTS LIMITED (UPSTAIRS RESTAURANT)	February 15, 1982	LLA
PHOENIX, B. et al (BANNISTER'S TAVERN)	October 29, 1981	LLA
SCHROETER, M. (LOADING ZONE RESTAURANT)	March 5, 1981	LLA
STEPHENSON, J.	December 24, 1982	MVD
STEVENS, ALFRED	January 21, 1981	CAA
WEDNESDAY'S CHILD RESTAURANT	February 25, 1983	LLA

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

DISMISSED

NAME	DATE	ACT
BATTISTA, J. P. (STRAND HOLIDAYS)	June 23, 1983	TIA
CALOGERO, V. L.	May 1, 1989	REBB
512310 ONTARIO LTD (SPIFFY'S RESTAURANT)	February 6, 1985	LLA
KOUYOUMDJIAN, H.	May 11, 1984	ONHW
MAX WIEDEMANN LTD (GRAYSTONE TAVERN)	October 14, 1981	LLA
PECK, C. (CHARLIE'S ROADHOUSE RESTAURANT)	September 30, 1988	LLA
RODNEY'S RESTAURANT INC.	April 6, 1982	LLA
SMITH, GEORGE J.	September 7, 1983	MVD

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURTALLOWED

NAME	DATE	ACT
GENTILE, A. (Allowed On Consent)	June 18, 1985	REBB
WESTMINSTER HOTEL Reported: 124 D.L.R. (3d) p.332	June 19, 1981	LLA

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURT

ABANDONED

NAME	DATE	ACT
AMARAL M. A. (AMARAL RESTAURANT)	February 12, 1980	LLA
ARNOLD'S (382844 & 419748 ONTARIO LTD)	December 19, 1983	LLA
BEACOM, BRUCE	July 11, 1984	NHW
BERTRAND, BRENT	July 11, 1984	NHW
BLUESCOONER ONTARIO LTD	April 2, 1980	LLA
BOBBY RUBINO CANADA LIMITED	April 27, 1984	NHW
CABARET RESTAURANT (502377 ONTARIO LIMITED)	December 15, 1988	LLA
CALIFORNIA'S MUSICAL ROADHOUSE INC.	March 24, 1988	LLA
CATALANO, B. et al	February 21, 1984	NHW
COMMODORE MOTOR HOTEL (MURPHY HOTEL ENTERPRISES LTD)	October 21, 1983	LLA
COTE, BEVERLEY	December 3, 1981	NHW
DAPRATT ENTERPRISES INC. (18 EAST RESTAURANT)	August 13, 1982	LLA
DIPLOMAT TAVERN	April 24, 1978	LLA
GERMENEY, MR. AND MRS. B.	July 11, 1984	NHW
GREELY CUSTOM HOMES LTD	June 6, 1988	NHW
HEATH, PATRICIA	July 11, 1984	NHW
LOCKWOOD, BERNARD BRUCE	July 11, 1984	NHW
McDIARMID, RAYMOND & ETHEL	April 3, 1989	NHW

THE SUPREME COURT OF ONTARIO
DIVISIONAL COURTABANDONED continued

NAME	DATE	ACT
RAYNER, BARRY	July 11, 1984	NHW
ROYAL TRUST CORPORATION OF CANADA (Re: Coutinho)	December 11, 1985	NHW
VANCKERS RESTAURANT (GEORGE TATSIPOULOS)	August 28, 1985	LLA
YORK CONDOMINIUM CORP. NO. 340 (File 1)	February 25, 1983	NHW

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